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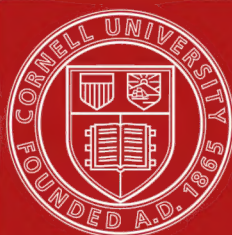
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DECISIONS

RELATING TO

THE LIQUOR TAX LAW

OF THE

STATE OF NEW YORK

Reported in New York Reports, Vols. 158 to 168, inclusive; Appellate
Division Reports, Vols. 37 to 70, inclusive; Miscellaneous Reports,
Vols. 26 to 36, inclusive, and miscellaneous unreported
decisions, chronologically arranged.

ARRANGED BY
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VOLUME II.

Prepared under the direction of
PATRICK W. CULLINAN, State Commissioner of Excise.

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DECISIONS

RELATING TO THE

LIQUOR TAX LAW

VOLUME 2

Third Appellate Department, January, 1899. Reported. 37 App. Div. 66.

In the Matter of the Separate Application of JOHN C. MCGRIEVEY and Others, Respondents, for a Writ of Certiorari to Review the Action of BARTLETT B. GRIPPEN, as County Treasurer of Saratoga County, Appellant, in Refusing to Issue a Liquor Tax Certificate.

State Commissioner of Excise—Discretionary power of, to cause an enumeration of the inhabitants of a city or village—The Liquor Tax Law does not confer an arbitrary power upon him.

Section 11 of the Liquor Tax Law (Chap. 112, Laws of 1896, as amended by chap. 312, Laws of 1897), by which the State Commissioner of Excise is vested with discretionary power, when the population of a city or village is not shown by the last State census, to cause an enumeration of the inhabitants, if he has any doubt as to the number of the population, does not confer upon him an arbitrary power, if he states that he has no doubt as to the population, to fix the tax at an increased rate where no separate enumeration has been made which would authorize the rate established by him.

The enumeration of the inhabitants of a village, directed by the trustees thereof under the Village Law, is not, within the meaning of that section, the last State census.

APPEAL by Bartlett B. Grippen, as county treasurer of Saratoga county, from an order of a justice of the Supreme Court, entered in the office of the clerk of the county of Saratoga on the 9th day of June, 1898, made upon the return of a writ of certiorari issued in pursuance of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112), directing that said treasurer issue to each of the applicants a liquor tax certificate under the provisions of subdivision 1 of section 11 of the Liquor Tax Law on the payment by each of the sum of \$100 upon filing their application and bond.

It was claimed by the applicants that neither the State nor the United States census showed the population of the village of Waterford, where the business of the applicants was to be carried on. There had been no separate enumeration by the State Commissioner of Excise.

Nussbaum & Coughlin, for the appellant.

J. W. Houghton and Thomas O'Connor, for the respondents.

MERWIN, J.: The views of this court in *Lyman v. McGrievy* (25 App. Div. 68) sustain the order appealed from unless certain legislation in 1897 calls for a different result.

Subdivision 1 of section 11 of the Liquor Tax Law (Laws of 1896, chap. 112) fixes the amount of excise tax upon a certain kind of traffic according to the population as indicated by the last State census of the place where the traffic is carried on. After fixing the rates in cities and villages having a population of 5,000 and upwards, the statute provides that if the traffic is carried on in a village having by said census a population of less than 5,000 but more than 1,200, the tax is \$200, and if in any other place, \$100.

It was further provided in section 11, as originally enacted, that "when the population of a city or village is not shown by the last State census, it shall be determined for the purposes of this act by the last United States census, and if not so shown by reason of the incorporation of a new city or village, the State commissioner of excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village."

The clause last quoted was amended by chapter 312 of the Laws of 1897 so as to read as follows:

“ When the population of a city or village is not shown by the last State census, it shall be determined for the purposes of this act by the last United States census, and if not shown by reason of the incorporation of a new city or village, or by reason of not having been separately enumerated, the State Commissioner of Excise is authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village if the commissioner has any doubt as to the number of the population as affecting the amount of the excise tax assessed thereon.”

It is claimed by the appellant that, under the act as amended, the State Commissioner of Excise, if he has no doubt as to the population, may fix the tax at an increased rate, although no separate enumeration has been made that would authorize it. Acting upon that theory, the State Commissioner, having, as he says, no doubt that the population of the village of Waterford, where the business of the applicants was carried on, was more than 1,200, fixed the tax at \$200, and so certified to the appellant, and the appellant thereupon refused to issue a certificate unless such sum of \$200 was paid.

The amendment vests in the commissioner a discretion as to whether or not he will make an enumeration, but it does not give him power, in the absence of an enumeration, to increase the tax according to his own idea of the population. An arbitrary power of that kind, if it can be given at all, needs to be given in express language.

In *Matter of Steenburgh* (24 Misc. Rep. 1) this question was quite fully and satisfactorily discussed, and need not be further discussed here.

We think that the contention of the commissioner in this regard should not prevail.

It is further claimed that an enumeration of the inhabitants of the village of Waterford, taken under the direction of the board of trustees of the village, in the month of January, 1898, in pursuance of section 310 of the Village Law (Chap. 414 of the Laws of 1897), should be deemed the last State census, and justified the action of the commissioner, as it indicated a population exceeding 1,200.

We are of the opinion that the enumeration directed by the trustees of the village under the Village Law is not “ the last

State census " within the meaning of section 11 of the Liquor Tax Law.

It follows that the order should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Fourth Appellate Department, January, 1899. Reported. 37 App. Div. 234.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, *v.* ROCHESTER TITLE INSURANCE COMPANY, Appellant, Impleaded with ANDREW G. SCHENCK and ANDREW P. SCHENCK.

Liquor Tax Law—A bond given in 1896 may be enforced for its face by the State Commissioner of Excise under the authority given by chap. 312 of the Laws of 1897—The statute is a part of the bond.

In the event of a violation of the Liquor Tax Law by the holder of a liquor tax certificate, who has given the bond required by section 18 of the Liquor Tax Law (Laws of 1896, chap. 112), an action may be maintained against the obligors on the bond to recover the penalty thereof, before any criminal proceedings have been instituted against the principal, and entirely independent of the provisions of sections 34 and 36 of the Liquor Tax Law.

Although the breach of the condition of the bond took place in 1896, at a time when the law as it then stood did not specify who might bring an action for the enforcement of the bond, an action may be brought thereon by the State Commissioner of Excise, after the passage of chapter 312 of the Laws of 1897, amending the Liquor Tax Law, under the authority thereby conferred upon him.

Such amendment in no way impairs the obligations of the contract, or changes the rights of the parties, but relates only to the form and mode of procedure.

Where a bond is given in pursuance of a statute, the provisions of the statute are in effect a part of the bond, and of the contract of the surety.

APPEAL by the defendant, the Rochester Title Insurance Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Ontario on the 19th day of April, 1898, upon the decision of the court rendered after a trial at the Monroe Special

Term, overruling the said defendant's demurrer to the plaintiff's complaint, and also, as stated in the notice of appeal, from the order overruling the demurrer and upon which an interlocutory judgment was entered.

The action was begun November 5, 1897, to recover the penalty of a bond executed by the defendants Schenck as principals and the defendant insurance company as surety.

In the complaint, it is alleged in substance that the plaintiff is the State Commissioner of Excise of the State of New York; that the defendants Schenck made application for a liquor tax certificate pursuant to chapter 112 of the Laws of 1896; that pursuant to the provisions of said law the defendants Schenck, as principals, and the defendant insurance company, as surety, made and executed their bond in the form prescribed by said act, by which they jointly and severally undertook that, if a liquor tax certificate should be given to the defendants Schenck, the obligors upon said bond would pay to the People of the State of New York the sum of \$600 in case said defendants Schenck violated any of the provisions of the Liquor Tax Law.

It is further alleged that at different times during the year 1896 the defendants Schenck violated the provisions of said Liquor Tax Law, in that they sold liquor on Sunday. Judgment is demanded for the amount of the penalty of said bond, to wit, \$600.

The defendants Schenck did not appear or answer. The defendant insurance company duly appeared and demurred to the complaint, upon the ground:

First. That it does not state facts sufficient to constitute a cause of action; and,

Second. Upon the ground that the plaintiff has no legal capacity to sue, in that the law gives him no authority to sue on the bond set forth in the complaint.

The bond is annexed to and made a part of the complaint, the conditions of which are as follows:

"Now, the conditions of the above obligation are such that if the said liquor tax certificate applied for is given unto the said Andrew G. Schenck and Andrew P. Schenck, the said Andrew G. Schenck and Andrew P. Schenck will not, while the business for such tax certificate is given shall be carried on, suffer or permit any gambling to be done in the place designated by the tax certificate in which the traffic in liquors is to be carried on, or in

any yard, booth or garden appertaining thereto or connected therewith, or suffer or permit said premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law, any act amendatory thereof or supplementary thereto, then this obligation shall be void; otherwise it is to be and remain in full force and effect."

George F. Yeoman, for the appellant.

Edwin Hicks, for the respondent.

McLENNAN, J. The bond in question was given, and all the alleged breaches of its conditions occurred, during the year 1896, and, therefore, the liability of the defendant must be determined by the bond itself and by the statute as it existed at that time.

It is elementary that where a bond is given, in pursuance of a statute, the provisions of the statute are, in effect, a part of the bond. (*McCluskey v. Cromwell*, 11 N. Y. 593; *People v. Chalmers*, 60 id. 154.)

The statute constitutes a part of the contract of the surety. (*People v. Pennock*, 60 N. Y. 421, 425.)

Section 11 of chapter 112 of the Laws of 1896 specifies the amount of tax which must be paid for a liquor tax certificate. The defendants Schenck were lawfully required to pay, and did pay, the sum of \$300, and a liquor tax certificate in due form was issued to them.

Section 18 of the act provides, in substance, that the applicant for a liquor tax certificate must execute a bond to the People of the State of New York, with sureties, in double the amount of the sum paid for the liquor tax certificate, containing, among others, the provision that if such certificate is given, he, the applicant, will not violate any of the provisions of the Liquor Tax Law while engaged in the business of trafficking in liquors under such certificate. And the section further provides that the bond so executed must contain, in substance, the agreement that if a liquor tax certificate is issued to such applicant, and he violates any of the provisions of said Liquor Tax Law, the penalty of such bond shall become due and payable to the People of the State, and that the principals and sureties upon said bond shall be jointly and severally liable for the payment of the same.

The bond in this case follows substantially the language of the section.

Section 31 of the act provides, among other things, that it shall be unlawful for any person holding a liquor tax certificate of the kind issued to the defendants Schenck to sell liquor on Sunday. It is clear that if the language of the bond and of section 18 of the act, under which it is given, is only considered, the liability of the defendant insurance company would be established upon proving that the defendants Schenck sold liquor on Sunday as alleged in the complaint.

The contention of the defendant insurance company, stated broadly, is that no liability can exist against it upon the bond which it executed as surety until the liability of its principals has been established as provided by section 36 of the Liquor Tax Law. That section provides, in substance, as follows: "Upon the conviction and sentence of any person * * * for a violation of the provisions of this act * * * the court * * * imposing the sentence, or the clerk of the court, if there be a clerk, shall forthwith make and file in the office of the clerk of the county in which such conviction shall have been had a certified statement of such conviction and sentence, and the clerk of said county shall immediately thereupon enter in the docket book kept by said clerk for the docketing of judgments in said office, the amount of the penalty or fine and costs imposed, as a judgment against the person or persons * * * so convicted and sentenced, and in favor of the State Commissioner of Excise. * * * If said judgment shall not be paid within five days after such conviction and sentence the clerk of said county shall issue an execution against the property of said judgment debtor or debtors, against whom said judgment is docketed, directed to the sheriff of the county, who shall forthwith proceed to collect the amount due on said judgment, together with his legal fees and costs, by levy and sale in the manner now provided by law. * * * In case such judgment debtor or debtors shall have given the bond provided for in section eighteen of this act, such county treasurer or special deputy commissioner may proceed to collect the amount of such judgment, together with the costs of collection, from the sureties on such bond by due process of law."

Section 34 of the statute specifies the penalty which may be imposed for a violation of the provisions of Liquor Tax Law. In substance it provides that any violation of the law by the holder of a liquor tax certificate shall be a misdemeanor, and that upon conviction therefor he may be punished by fine or imprisonment,

or both, in the discretion of the court before whom such conviction is had, and in addition, in most cases, upon such conviction the liquor tax certificate is required to be canceled by the judgment of the court, and the holder thereof disqualified from again engaging in the business of trafficking in liquors for a period of five years.

If the defendants Schenck are guilty of violating one of the provisions of section 31, as alleged in the complaint, to wit, guilty of selling liquor upon Sunday, upon conviction for such offense they may be punished by fine or imprisonment, or both, in the discretion of the court before whom such conviction may be had, and the sureties upon the bond, if given, are liable to the amount of the fine imposed.

But if this is the entire liability of the obligors upon a bond like the one in question, no force or effect is given to the express agreement contained in said bond. That agreement, which is in accordance with the provisions of section 18 under which it is given, is that if a person holding a liquor tax certificate violates any of the provisions of the Liquor Tax Law, the obligors upon the bond will forfeit to the People of the State double the amount of the tax paid by the holder of such certificate.

The meaning of the agreement cannot be uncertain if the words are given their ordinary significance. It is that the obligors upon the bond will pay to the People of the State of New York the sum of \$600 in case the principals in the bond violate any of the provisions of the Liquor Tax Law.

It is urged that such is not the true meaning of the bond, by reason of the provisions of the other sections of the statute which have been referred to. If such was not the agreement intended, but, instead, it was intended that the liability of the sureties should be limited to such fine as might be imposed upon the holder of the liquor tax certificate, in case of conviction for such violation by him, hardly less appropriate language could have been used by the Legislature to express such intention.

We think that the scope and purpose of the statute in question is plain; that when the language of the bond, of section 18 under which it is given, and of the other provisions of the act are all considered, and the words used are given their ordinary meaning, the different provisions of the statute will be found to be in entire harmony, and to express clearly a reasonable purpose and intent on the part of the Legislature.

By the statute as a whole two methods are provided for com-

selling the observance of the Liquor Tax Law by those engaged in the business of trafficking in liquors:

First. In case of any violation of the law by a holder of a liquor tax certificate, who has given a bond as provided for in section 18 of the act, a civil action may be maintained against the obligors upon said bond to recover the penalty of such bond. This may be done before the institution of any criminal proceedings, before such delinquent is convicted, and entirely independent of the provisions of sections 34 or 36 of said act; or,

Second. The holder of a liquor tax certificate, who has violated any of the provisions of the Liquor Tax Law, may be proceeded against criminally, and if found guilty, such person may be punished by fine or imprisonment, or both, in the discretion of the court before whom such conviction is had, and if a fine is imposed, the surety upon a bond, such as the one in question, is liable for the amount of such fine.

Such construction gives force and effect to all of the provisions of the statute involved in the case.

If we have correctly construed the provisions of the statute and properly interpreted the meaning of the bond in question, it follows that the complaint states a cause of action against the defendants.

We believe that the plaintiff has legal capacity to maintain this action.

Section 18 of chapter 112 of the Laws of 1896 did not specify by whom an action might be brought for the enforcement of a bond given pursuant to such section, and there was no provision of the statute which in express terms authorized the bringing of such action by the State Commissioner of Excise.

The act was amended by chapter 312 of the Laws of 1897, and there was added to section 18 the following:

"The State Commissioner of Excise may at any time, without previous prosecution or conviction for violation of any provision of the Liquor Tax Law, or for the breach of any condition of said bond, commence and maintain an action in his name as such commissioner, in any court of record in any county of the State, for the recovery of the penalty for the breach of any condition of any bond, or for any penalty or penalties incurred or imposed for a violation of the Liquor Tax Law, and all moneys recovered in such actions shall be paid over and accounted for in the same

manner as are moneys collected under subdivision four of section eleven of this act."

We think that, by virtue of such amendment, the plaintiff had ample power and authority to maintain this action, notwithstanding the breaches of the bond complained of occurred during the year 1896, and before such amendment to the statute was made. The amendment in no way impairs the obligation of the contract. The rights of the parties have not thereby been changed. The change relates only to the form and mode of procedure, and the Legislature had the right to make such change.

In the case of *Matter of Davis* (149 N. Y. 545) the court says (MARTIN, J.): "The method of procedure for the enforcement of a Transfer or Inheritance Tax Law was somewhat changed by chapter 713 of the Laws of 1887, and chapter 399 of the Laws of 1892. The procedure is controlled by the statute as it existed at the time this proceeding was instituted. It is a general rule that in the absence of words of exclusion a statute which relates to the form of procedure, or the mode of attaining or defending rights, is applicable to proceedings pending or subsequently commenced. * * * Hence, the rights of the parties depend upon the statute of 1885, while the method of procedure is governed by that of 1892."

In the case of *Lazarus v. M. E. R. Co.* (145 N. Y. 585) the court say (ANDREWS, Ch. J.): "It is well settled that the Legislature may change the practice of the court, and that the change will affect pending actions in the absence of words of exclusion. (*Southwick v. Southwick*, 49 N. Y. 510.) The court can not, under guise of an amendment or repeal of a statute, cut off any substantial right of a party to have his case decided on the merits according to the law of the land. But it would be a very inconvenient rule, tending to great confusion, if the rule of practice existing when an action is commenced attaches itself to the substance of the right in litigation, so that it could not be changed, or that a law changing procedure should be held inapplicable to subsequent proceedings in pending actions, unless in terms made applicable thereto. It is the right of a party to have his case heard and decided in the orderly course of legal procedure, but he has no right to demand that the procedure prescribed when the action was commenced should remain unchanged. He prosecutes his action subject to the power of the Legislature in matters of practice to abrogate rules existing when

his action was brought, or make additional rules, and all subsequent proceedings will be governed thereby."

In the case at bar, under a provision of the statute enacted by the Legislature, the defendant insurance company obligated itself upon the happening of certain events, to pay to the People of the State of New York the sum of \$600. It is believed that even if the Legislature failed to indicate by the act creating such liability the person or persons or method by which such obligation should be enforced, it was entirely competent for a subsequent Legislature to supply such defect, and to designate any person or persons to represent the People as plaintiff in an action brought for the purpose of enforcing such obligation. This we believe the Legislature of 1897 did by the amendment referred to.

By the amendment of 1897 the obligation of the defendant insurance company was not changed or modified in any respect. It simply was made enforceable in an action brought by the State Commissioner of Excise as plaintiff.

The conclusion is reached that the judgment entered upon the decision of the court at Special Term, overruling the demurrer of the defendant insurance company, should be affirmed, with costs, but with leave to the defendant insurance company to withdraw its demurrer and serve an answer to the complaint within twenty days from the service of notice of the judgment of this court, upon payment of the costs of the demurrer and of this appeal.

Judgment is ordered accordingly.

All concurred, except WARD, J., not voting.

Interlocutory judgment affirmed, with costs, with leave to defendant to withdraw its demurrer and answer upon payment of the costs of the demurrer and of this appeal.

Third Appellate Department, January, 1899. Reported. 37 App. Div. 626.

In the Matter of the Separate Applications of CHARLES M. DEGRAFF and Others, for a Writ of Certiorari to Review the Action of GEORGE L. CLEMONS, as County Treasurer of Washington County, in Refusing to Issue a Liquor Tax Certificate.

APPEAL from an order directing appellant to issue liquor tax certificate to above-named applicants.

Nussbaum & Coughlin, for appellant.

See brief filed in Matter of McGrievy v. Grippin, 37 App. Div. 66.

R. O. Bascom, for respondent.

The order was properly granted; the population of an incorporated village or city is to be determined solely by the last State or Federal census. (*Lyman v. McGrievy*, 25 App. Div. 68.)

The population not being shown by such census, the tax is \$100. (Liquor Tax Law, § 11, subd. 1; *People ex rel. Cramer v. Medbery*, 17 Misc. 8.)

Order affirmed, with ten dollars costs and disbursements.

Third Appellate Department, January, 1899. Reported. 37 App. Div. 626.

In the Matter of the Separate Applications of WILLIAM F. MATHEWS and Others, for a Writ of Certiorari to Review the Action of GEORGE L. CLEMONS, as County Treasurer of Washington County, in Refusing to Issue a Liquor Tax Certificate.

Nussbaum & Coughlin, for appellant.

See brief filed in Matter of McGrievy v. Grippin, 37 App. Div. 66.

A. V. Pratt, for respondent.

See brief filed for respondent in Matter of McGrievy.

Order affirmed, with ten dollars costs and disbursements.

Fourth Appellate Department, January, 1899. Reported. 37 App. Div. 630.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JACOB
MUELLER, Appellant.

This is an appeal from a judgment convicting defendant of selling liquor on Sunday and from an order denying defendant's motion for a new trial.

Hazel & Abbott, attorneys for appellant.

The court erred in not submitting to the jury the question as to whether or not a sandwich or a cracker constituted a meal; also, as to whether or not the people who were in defendant's place on the evening in question were guests.

The court erred in charging the jury "while I do not think it necessary in this case to submit that question to you, if you believe the People's witnesses;" *McKenna v. People*, 81 N. Y. 360; *People v. Flack*, 125 N. Y. 335; *People v. Ledwon*, 153 N. Y. 10.

The court erred in charging the jury "this is in brief the testimony of the People and if you are satisfied with its truthfulness, then a case has been made out." *McKenna v. People*, (*supra*).

The court erred in sentencing the defendant to pay a fine of \$100, and in default of the payment thereof to be committed to the Erie county penitentiary. *People v. Kinney*, 24 App. Div. 309.

Daniel J. Kenefick, attorney for respondent.

The question whether or not a sandwich or a cracker constituted a meal was submitted to the jury. There was no question to submit to the jury as to whether the men were guests or not, and this was not asked or requested by defendant's counsel.

There was an error in charge of judge that "While I do not think it necessary in this case to submit that question to you, if you believe the plaintiff's witnesses" because there was no controversy between the witnesses of the People and the defendant's witnesses, and if there were any errors, it was cured by subsequent utterance of the court.

The sentence imposed is no part of the judgment of conviction and cannot be remedied or reviewed on this appeal.

Judgment of conviction modified by striking therefrom the words, "And in default of the payment thereof to be committed to the Erie county penitentiary at hard labor until such fine shall be paid not exceeding one day's imprisonment for each and every dollar so imposed as a fine," and as so modified judgment affirmed. The judgment to be entered and certified to the Supreme Court of Erie county, pursuant to section 547 of the Code of Criminal Procedure.

All concurred, except WARD, J., not voting.

Fourth Appellate Department, January, 1899. Reported. 37 App. Div. 630.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOSEPH MATTHEWS, Appellant.

APPEAL by defendant from judgment of conviction adjudging him guilty of violating the Liquor Tax Law in keeping his place of business open between one and five o'clock a. m.

Josiah Perry, appellant's attorney.

The court erred in excusing juror Foley upon the people's challenge, and the defendant can take advantage of this error. (*People v. McQuade*, 110 N. Y. 303-306; *Hildreth v. City of Troy*, 101 N. Y. 234.)

A juror who swears he can decide the case upon the evidence, is a competent juror, even though he would take into consideration before rendering a verdict his opinion of the Liquor Tax Law. (*Bablo v. People*, 80 N. Y. 484; *People v. Coonette*, 92 N. Y. 85; Criminal Code, sec. 376.)

The court should set aside the verdict. The question is not whether there is a scintilla of evidence to sustain it, but whether there is any upon which a jury could find a verdict. (*Dwight v. Germania Ins. Co.* 103 N. Y. 159; *Hall v. Stevens*, 116 N. Y. 210; *Bulger v. Rosa*, 119 N. Y. 264; *Linkhauf v. Lombard*, 137 N. Y. 426.

A person may be asked the direct question as to whether a

person he has seen was intoxicated. (*People v. Eastwood*, 14 N. Y. 562; *Rice on Evidence*, Vol. 3, p. 143; *DeWitt v. Bailey*, 17 N. Y. 352; *People v. Gaynor*, 33 App. Div. 98.)

It was error for the court to prevent the defendant's counsel in summing up from discussing the effect of the conviction of the defendant. (*People v. Cassiano*, 30 Hun, 388, *Thompson on Trials*, Vol. 1, secs. 949-951.)

It is error to abridge defendant's right to be heard on all the facts and circumstances which are in evidence. (*Beasley v. State*, 71 Ala. 328; *Abbott's Crim. Brief*, sec. 699; *Rumsey Prac.* Vol. 2, p. 305.)

George S. Klock, attorney for respondent.

The question of defendant's guilt or innocence was purely a question for the jury. (*People v. Tuzkewitz*, 149 N. Y. 240; *People v. Schooley*, 149 N. Y. 104; *Carrington v. People*, 6 Parker's Crim. Rep. 343.)

The question as to whether the people's witness, Myers, was intoxicated, was a collateral question, and defense was bound by cross-examination of Myers. (*Carpenter et al. v. Ward*, 30 N. Y. 243; *Plato v. Reynolds et al.*, 27 N. Y. 586; *Stokes v. People*, 53 N. Y. 164.)

The court did not err in excusing the juror Foley. (*Greenfield v. People*, 74 N. Y. 277; *People v. Bodine*, 1 Denio, 281-305; *People v. McLaughlin*, 73 St. Rep. 496; *People v. McQuade*, 110 N. Y. 300; *People v. McGonegal*, 136 N. Y. 62; *People v. Carolin*, 115 N. Y. 658.)

It was not error for the court to instruct defendant's attorney, in summing up, to abstain from stating to jury the sentence that would follow conviction and the consequence of it. (*People v. Cassiano*, 30 Hun, 388.)

If the judgment in being in the alternative is erroneous, it may be corrected on the appeal.

Judgment modified by striking out the provision for imprisonment in case the defendant fails to pay the fine, and, as thus modified, judgment affirmed. Judgment to be entered and certified to the Oneida County Court, pursuant to section 547 of the Code of Criminal Procedure.

All concurred, except WARD, J., not voting.

Supreme Court, Chenango Special Term, February, 1899. Reported.
26 Misc. 220.

THE PEOPLE ex rel. CHARLES C. HOVEY, Relator, v. THE TOWN
CLERK OF THE TOWN OF BAINBRIDGE, CHENANGO COUNTY, N. Y.,
Defendant.

Liquor Tax Law—A petition for a resubmission of local option must be
filed twenty days before the town meeting.

The provisions of section 32 (formerly section 34) of the Town Law (Laws of 1890, chap. 569) apply to a petition of town electors, who request, under the Liquor Tax Law (Laws of 1896, chap. 112, sec. 16, subd. 4, as amended by Laws of 1897, chap. 312), a resubmission to the electors at a town meeting of the question of local option, and hence unless the petition is, in accordance with the Town Law, filed with the town clerk at least twenty days before the town meeting, his refusal to print the ballots required for such resubmission is justified and action upon his part will not be compelled by mandamus.

APPLICATION for a peremptory writ of mandamus.

Johnson & Huntington, for relator.

W. B. Matterson, for defendant.

MATTICE, J. The relator applies for a peremptory writ of mandamus to compel the town clerk of the town of Bainbridge to print the necessary and required ballots for resubmitting to the electors of the town of Bainbridge the four propositions enumerated in section 16 of the Liquor Tax Law (Laws of 1896, chap. 112.)

The electors of the said town of Bainbridge, to the number of 10 per centum of the votes cast at the last preceding general election, prepared, signed and acknowledged a petition in writing in due form of law and caused the same to be filed in the town clerk's office on the 28th day of January, 1899.

The papers show that such town clerk refused to have printed and prepared the ballots necessary to enable the electors to vote upon such propositions at the coming annual town meeting, February 14, 1899.

The town clerk assigns as his reason for such refusal that the petition was not filed in his office at least twenty days before the town meeting.

Section 32 of the Town Law, as renumbered in section 14 of chapter 481 of the Laws of 1897 (formerly section 34 of chapter 569 of the Laws of 1890), reads as follows: "No proposition or other matter than the election of officers, shall be voted upon by ballot at any town meeting, unless the town officers or other persons entitled to demand a vote of the electors of the town thereon, shall, at least twenty days before the town meeting, file with the town clerk a written application, plainly stating the question they desire to have voted upon, and requesting a vote thereon at such town meeting."

Subdivision 4 of section 16 of the Liquor Tax Law, as amended by chapter 312 of the Laws of 1897, provides, among other things, that "The same questions shall be again submitted in the same way at the annual town meeting held in every second year thereafter, provided the electors of the town to the number of ten per centum of votes cast at the next preceding general election shall, by written petition, signed and acknowledged by such electors before a notary public or other person authorized to take acknowledgments or administer oaths and *duly filed* with the officer charged with the duty of furnishing ballots for the election, request such submission."

The counsel for the relator claims that the Liquor Tax Law is a law by itself, and has no relation to and is entirely independent of the Town Law, and that the section of the Town Law above quoted has no application. His theory is that the words "duly filed" mean that the petition shall be filed with the town clerk or officer charged with the duty of preparing the ballots, within a reasonable length of time and long enough to enable the officer to prepare and have printed the proper ballots.

I think his contention is wrong. The resubmission of the question under the Liquor Tax Law is peculiarly a town matter. It is a proposition "to be voted upon by ballot" at a town meeting.

Ballots must be in the form and of the number required by the Election Law for voting upon other propositions or questions, and in all other respects the balloting upon the resubmission of these questions must be identical in manner and form, as the voting upon any other proposition which could be lawfully submitted at an annual town meeting.

The course of legislation upon the subject of giving notice to the electors of towns of propositions to be voted upon, indicates

that it was the intention of the Legislature that the people should have ample notice and ample time to consider all propositions to be thus voted upon.

Chapter 122 of the Laws of 1883 provided that the town clerk should give twenty days' notice of all propositions to be voted for at town meetings authorizing the raising of money exceeding the sum of \$500, and such vote should be by ballot.

The Town Law of 1890, as above stated, prohibits the voting by ballot upon "a proposition or other matter" except the election of officers, unless the petition should be filed at least twenty days before the town meeting, and the town clerk is directed by that law to post conspicuously in at least four of the most public places in town, ten days' notice of such proposition.

There is no force in the suggestion of counsel that the Town Law has no application because it was passed before the Liquor Tax Law, which authorized for the first time the submission of these questions. The Town Law is general and sweeping in its provisions and was intended not only to apply to all propositions and questions which could then be lawfully submitted, but to all other propositions that could thereafter be submitted by reason of subsequent enactments.

Moreover, the Legislature is presumed to have enacted the Liquor Tax Law, as well as all other laws, in reference to the statutes then in force. There is nothing in the Liquor Tax Law that supersedes or repeals the Town Law, either expressly or by implication. Neither is there anything in such law repugnant to the Town Law so far as this question is concerned.

These statutes are *pari materia* and relate in some degree to the same subject, to wit: the action of electors at town meetings; and under well-settled rules of construction force and effect should be given to both statutes.

The Legislature did not intend to leave the question of the time of filing to the discretion of each town clerk in each particular case. What might seem a reasonable time to one clerk might not seem so to another. There would be endless confusion. Courts would be constantly called upon to define what a reasonable length of time in each particular case should be, and in many cases the public would get very little, if any, notice of so important a proposition.

It must be observed also that the words "duly filed" are used in the statute. These words mean something more than the mere act

of filing. The word "duly" means according to some rule of law. The statute is the same as though it read "filed in accordance with law."

In *Brownell v. Town of Greenwich*, 114 N. Y. 518, it was held by the Court of Appeals, VANN, J., writing the opinion of the court, that "duly" in legal parlance means according to law; that "it does not relate to form merely, but includes form and substance both."

I am satisfied that the words "duly filed" mean, according to the statute governing the subject of filing petitions, to wit: the Town Law.

The statute is mandatory and prohibits a vote by ballot unless the petition shall have been filed twenty days. The clerk had no discretion.

It follows, therefore, that the town clerk was right in refusing to prepare and print the ballots for the reason that the petition had not been filed in his office twenty days before the ensuing town meeting.

The application for the writ is denied, but as the question is a new one, no costs are allowed.

Application denied; no costs.

Supreme Court, Albany Special Term, February, 1899. Reported.
26 Misc. 300.

Matter of the Petition of HENRY H. LYMAN for an Order Revoking
Liquor Tax Certificate issued to WILLIAM FAGAN.

1. Liquor Tax Law—Sale of liquor after surrender of certificate.

The sale of liquor by the holder of a liquor tax certificate, after he has surrendered it to the county treasurer to procure a rebate, forfeits the certificate and the rebate also.

2. Same—On revocation of certificate, its pledgee need not be served.

A mere pledgee of such a certificate need not be served with a petition and order to show cause why the certificate should not be revoked, as such a pledgee is not "the holder of such certificate" within the meaning of the statute (Laws of 1896, chap. 112, sec. 28, subd. 2, as amended by Laws of 1897, chap. 312, sec. 19.)

APPLICATION for the revocation of a liquor tax certificate.

William E. Schenck, for petitioner.

James J. Farren, for defendant.

CHESTER, J.: The defendant contests this application on two grounds: *first*, because the assignee of the certificate has not been made a party to the proceeding, nor been served with a copy of the petition and order to show cause, and *second*, because, as he claims, he has not violated any provision of the Liquor Tax Law, a conviction for which would cause a forfeiture of his certificate, or of the right to a rebate of a portion of the tax paid thereon.

The last-mentioned ground will be considered first.

The proof shows that application, under section 25 of the Liquor Tax Law, to surrender the certificate in question, and for a refunding of the *pro rata* amount of the tax paid for the unexpired term of such certificate, was made to the county treasurer of Albany county on November 30, 1898. The petition, which was accompanied with the surrendered certificate, stated that the petitioner had voluntarily ceased to traffic in liquors during the term for which said certificate was issued. The petition and certificate were received in due course by the State Commissioner of Excise the next day, December 1st. Notwithstanding this surrender and application for rebate, the defendant did not cease to traffic in liquors, but thereafter, and during the month of December, sold whiskey to be drunk on the premises where sold, and for which this certificate was issued. For this trafficking after the surrender of the certificate the petitioner seeks to procure a revocation and cancellation of the certificate, the effect of which will be a forfeiture of all right to any rebate thereunder. § 25, Liquor Tax Law, chap. 112, Laws 1896, as amended by chap. 312, Laws 1897.

This proceeding was commenced within thirty days after the receipt of the certificate by the State Commissioner of Excise.

The contention of the defendant with respect to this branch of the case is, in brief, that so long as the surrender of the certificate had not yet been accepted and the rebate paid, the certificate was still in force, and, therefore, that this selling of whiskey, in December, was not an unlawful trafficking in liquor and that the only effect of such selling is to deprive him or his assignee of the right to the rebate for that month. He insists that there is nothing in the Liquor Tax Law to make such selling

a cause for forfeiture of the certificate or of the rebate, and that, therefore, the petition must be dismissed and leave him or his assignee free to make a new application for surrender and for the rebate for such time during the remaining term of the certificate as he has, in fact, ceased wholly from the traffic.

The Liquor Tax Law provides, in section 21, that "before commencing or doing any business for the time for which the excise tax is paid and the certificate is given, the said liquor tax certificate shall be posted up and at all times displayed in a conspicuous place in the room or bar where the traffic in liquors for which the tax was paid is carried on, so that all persons visiting such place may readily see the same, but if there be a door opening from the street into the room or barroom where the traffic in liquors is carried on and a window facing the street upon which such door opens, such certificate shall be displayed in such window so it may be readily seen from the street."

The certificate in question bore on its face the words, "severe penalties are imposed for neglect or refusal to place and keep this certificate conspicuously in your place of business," in accordance with the requirement to that effect contained in section 20.

Section 31 of said law provides that, "It shall not be lawful for any corporation, association, copartnership or person which, or who, has not paid a tax as provided in section eleven of this act and *obtained and posted the liquor tax certificate as provided in this act to sell, offer or expose for sale*, or give away liquors in any quantity less than five wine gallons at a time; nor, without having paid such tax *and complied with the provisions of this act*, to sell, offer or expose for sale, or give away liquor in any quantity whatever, any part of which is to be drunk on the premises of such vendor."

Subdivision 2 of section 34 of said law provides that "Any corporation, association, copartnership or person, * * * who shall violate the provisions of this act by trafficking in liquors contrary to the provisions of sections eleven, twenty-two, twenty-three, twenty-four, thirty or thirty-one, shall be guilty of a misdemeanor, and upon conviction therefor * * * shall forfeit the liquor tax certificate, and be deprived of all rights and privileges thereunder, * * * and of any right to a rebate of any portion of the tax paid thereon."

Subdivision 2 of section 28 of said law authorizes any citizen of the State to present a verified petition to the court or a justice

for an order revoking and cancelling the certificate upon the ground that the holder "is not entitled, on account of the violation of any provisions of this law, conviction for which would cause a forfeiture of such certificate, or for any other reason to hold such certificate."

The law also requires a person holding a certificate who has ceased to traffic in liquors thereunder, and who applies for a rebate, to surrender his certificate to the officer who issued the same or to his successor in office. § 25. This was done in this case. It is evident that the surrender of the certificate required by this section could not be made and at the same time that it could be conspicuously posted up in the barroom or the barroom window as required by section 21. It is clear, therefore, that the sales of liquors proven in this case were made when the certificate was not so posted and in violation of that section.

But it is said that section 21 is not one of those named in subdivision 2 of section 34, above mentioned, in which is enumerated the sections, a violation of which is a cause for forfeiture of the certificate and of the right to a rebate thereunder. This is true, but section 31 is there named, and in that section it is made unlawful for any person who has not paid the tax *and* posted the certificate as provided in the act, to sell liquors in any quantity less than five wine gallons at a time, nor "without having paid such tax *and* complied with the provisions of this act, to sell * * * liquor in any quantity whatever, any part of which is to be drunk on the premises of such vendor." It will be seen that the word "and" and not the word "or" is used to connect the different parts of these sentences and, therefore, the payment of the tax alone is not sufficient to protect the vendor. He must do that and also comply with the provisions of the law with respect to posting the certificate where it can at all times readily be seen, else the sale of liquor is illegal under section 31. That was not done in this case. The sale was, therefore, illegal under that section and cause for forfeiture of the certificate and of all right to rebate thereunder pursuant to subdivision 2 of section 34.

The defendant also insists that the provision of the law (§ 28, subd. 2), requiring that a copy of the petition and order "shall be served upon the holder of such certificate," has not been complied with. The claim is that the Quinn & Nolan Ale Brewing Company is the holder of the certificate by virtue of an assignment

thereof to it. It appears that on the 30th day of April, 1898, the day upon which the certificate bears date, the defendant executed a paper in which it was recited that this brewing company had loaned him the sum of \$150 for the purpose of enabling him to pay the tax and take out the certificate and for which he had delivered to such company his note and that he sold and assigned such certificate to said brewing company, and all moneys to be refunded upon the surrender thereof, as collateral security for the payment of said note. He also, in that paper, appointed the general manager of the company as his attorney to surrender said certificate and to receive and receipt for the rebate. The petition for the surrender was made in the name of the defendant by such general manager under this power of attorney.

There is no claim here that there has ever been any transfer of the certificate under section 27 of the Liquor Tax Law to the brewing company, which would authorize it, instead of the defendant, to carry on the business under the certificate.

It seems to me clear that the phrase "holder of the certificate," as used in the statute, means the person authorized to sell liquors under it and cannot fairly be held to mean a corporation who may chance to have an assignment of it as collateral security for a loan. This construction is evident from an examination of section 11 of the law, where the phrase is used in that sense in several of the subdivisions of that section. For instance under subdivision 1, which is the one under which the certificate in question was issued, after defining the taxes and the kind of traffic that may be carried on under that subdivision, it is said, "the holder of a liquor tax certificate under this subdivision is entitled *also* to traffic in liquors as though he held a liquor tax certificate under subdivision 2 of this section." The phrase is used also with the same meaning in subdivisions 2, 3 and 5. It is used again in section 25 of the law, where it is said that "a person holding a liquor tax certificate and authorized to sell liquors under the provisions of this act" may surrender the same and apply for a rebate under the conditions named in this section.

If I am right as to the meaning of this phrase which I have stated the defendant was the holder of the certificate in question, and service of the petition and order upon him alone was sufficient to give the court jurisdiction of the proceeding and to revoke the certificate.

It was held in *People ex rel. Miller v. Lyman*, 27 App. Div. 527; affirmed, 156 N. Y. 407, that the indictment and arrest of one of

a firm holding a liquor tax certificate within thirty days after the surrender, for a violation of the Liquor Law, suspends the right of an assignee holding the same as collateral security to the rebate, and that the right of such assignee to the rebate was conditional and dependent upon the completion of thirty days after the surrender without a violation of the law by the persons to whom it was issued. This case supports to a considerable extent the view of the statute I have above indicated.

For the reasons given I think the certificate should be revoked and canceled with such costs to the petitioner as may properly be taxed in a special proceeding under section 3240 of the Code of Civil Procedure.

Ordered accordingly. _____

Supreme Court, Onondaga Special Term, February, 1899. Reported.
26 Misc. 532.

Matter of the Petition of JAMES P. LEWIS et al., for an Order
Revoking and Canceling Liquor Tax Certificate Issued to FRANK
PILCHEN.

1. Liquor Tax Law—Distance of a hotel from a schoolhouse to be measured in a straight line.

The statutory provisions (Laws of 1896, chap. 112, sec. 24, subd. 2, as amended by Laws of 1897, chap. 312, sec. 16) forbidding traffic in liquor in any building within 200 feet of a building occupied exclusively as a church or schoolhouse are to be construed strictly and require the measurement to be made by the shortest line which can be drawn between the entrances of the respective buildings, without regard to the distance between the entrances as measured on the traveled highway.

2. Same—Exemption of a hotel, in use March 23, 1896, lost by abandonment.

A hotel, within the 200-foot limit and exempted because it was used for liquor traffic on March 23, 1896, when the Liquor Tax Law took effect, loses its exemption by being vacant, or by being used as a store, for the period between July 1, 1897, and October 1, 1898.

THE petitioners are citizens of the county of Lewis wherein said Pilchen is conducting a traffic in liquors under a certificate issued to him by the county treasurer of said county.

The application to have the certificate canceled is based mainl

upon the ground that the building wherein the traffic is being carried on is within the prohibited distance of another building used as a schoolhouse.

In answer and defense to the application upon said ground the question is presented whether the traffic in liquors was so carried on in said building upon March 23, 1896, and has been since as to exempt Pilchen and his certificate from said prohibition.

Frank Bowman, for application.

Edgcomb & Rafferty, for defendant.

HISCOCK, J. The facts upon this application are substantially undisputed. The building wherein the traffic in liquors under the certificate in question is being carried on is and has been used and occupied as a hotel. The building is situated at the intersection of two roads. Upon one of these roads is a schoolhouse. There is an entrance upon the side of the building towards the schoolhouse. Measured in a straight line the distance from said entrance to the nearest entrance to the schoolhouse is less than two hundred feet. Measured in the only way by which a person could travel by the highway from the entrance in said hotel to the entrance in said schoolhouse the distance is more than two hundred feet. It is contended by the defendant that the distance must be measured in the latter way. I am unable, however, to agree with this contention. The amendment by chapter 312 of the Laws of 1897, of section 24, subdivision 2 of the Liquor Tax Law, providing that the distance under the prohibition in question shall "be taken in a straight line from the center of the nearest entrance of the building used for such church or school to the center of the nearest entrance of the place in which such liquor traffic is desired to be carried on," is so significant and explicit as not to leave any doubt about the intention of the Legislature. This amendment providing for a measurement in a "straight line" between the two entrances was undoubtedly passed to prevent the possibility of a claim such as that now made by defendant. Leaving out of the statute the words in question there might many times be some doubt about how the measurement in question should be made and whether the building in which the traffic was to be carried on was within the prohibited distance. The amendment in question obviates any such doubt as that. It says in effect, as explicitly as possible,

that the measurement shall be tested by the shortest line which could be drawn between the two entrances. This does not permit any angles or curves or digressions for intervening buildings or for street lines. The intention and purpose of the law upon the subject of the liquor traffic to keep its pursuit a certain distance away from schools and churches is obvious and plain and its provisions in this respect are to be construed liberally in favor of the school buildings and churches. *People ex rel. Clausen v. Murray*, 5 App. Div. 441.

In this case a liberal construction of the statute is not necessary to sustain the claim of the petitioners. The wording of the statute seems to be as explicit and direct as possible upon this subject in favor of their claim.

Starting out, therefore, with the holding that the building wherein the defendant seeks to carry on his business and for which he has obtained his certificate in question is within the prohibited distance of a schoolhouse, I come to the consideration of the other and second question which is presented in defense to the application.

The liquor traffic was carried on in this building March 23, 1896, when the statute covering this subject was passed, and, therefore, and within the provisions of the latter did not at that time come within the prohibition which is being discussed. It is urged by petitioners, however, that subsequently to that date and prior to the date when defendant applied for and received his certificate, the liquor business had been suspended and abandoned at the building in question, and, therefore, the exemption which is mentioned had been lost and said building placed within the two hundred-feet prohibition.

The facts as they appear upon this latter question are as follows: About July 1, 1897, the tenant who had been occupying said building and conducting the liquor business was removed therefrom and for four or five months after said date said premises remained entirely vacant. For a short period then ensuing part of the building was used for the conduct of a small store. Then it remained entirely unoccupied until about October 1, 1898, when the defendant leased the premises of the owner and went into occupation and commenced to transact business under the certificate in question. It is claimed in behalf of defendant that during said period, July 1, 1897, to October 1, 1898, the owner of the building was trying to obtain some tenant to occupy the same.

When defendant applied for the certificate in question he stated in his application that traffic in liquors was actually lawfully carried on in the premises in question on March 23, 1896, and in answer to the question "Since what date have said premises been occupied continuously for such traffic in liquor?" he answered "Twenty years."

There can be no doubt that the premises were not continuously used for traffic in liquors during the twenty years preceding defendant's application, or that such traffic was suspended during the period, July 1, 1897, to October 1, 1898. The only question is whether the suspension was such an abandonment of the use of the premises for the liquor business as destroyed the exception above quoted in favor of a building used for the liquor traffic March 23, 1896, I think it was. The provision of the Liquor Tax Law that this prohibition against the use of buildings for the traffic in question when situated within a certain distance of a school house, should not apply to premises used for said business at the time when the law was passed, was an exception to a general rule. In accordance with the general principles of construction such exception is to be strictly construed. Its object was to allow the continued use of buildings at the time of the passage of the law devoted to the conduct of this business. It was not its purpose to allow premises whereon the conduct of this business should be abandoned or discontinued to again at some future date secure the benefit of this exception. While periods of suspension may be conceived of so temporary in their character as not to operate as an abandonment of the premises for this purpose, I do not think that the one in question was of such a character. This question, upon facts quite as favorable to the certificate holder as existed in this case, has been decided adversely to the claims now made by the defendant. *Matter of Lyman v. Fuhrmann*, 34 App. Div. 389; 54 N. Y. Supp. 294; *People ex rel. Bagley v. Hamilton*, 25 App. Div. 428.

The conclusion reached upon the questions above discussed renders it unnecessary to decide whether the consents obtained by defendant of neighboring residents and citizens were sufficient. The application for an order revoking defendant's certificate is granted, with costs.

Application granted, with costs.

Fourth Appellate Department, February, 1899. Reported. 37 App. Div. 632.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* THEODORE VENDERBOSCH, Respondent.

APPEAL by plaintiff from a judgment of Supreme Court entered upon verdict of a jury. The action was brought to recover the statutory penalty for maintaining booths or stalls in a barroom in violation of paragraph "h" of section 31 of the Liquor Tax Law.

The court charged the jury that unless the alleged obstruction was used for the purpose which was intended to be prohibited by the Liquor Tax Law, it was not a violation of it.

Royal R. Scott, attorney for appellant.

Box stalls are absolutely prohibited; plaintiff need not show that defendant is using them. *Com. v. Moore*, 145 Mass. 244, 13 N. E. Rep. 893; *Com. v. Worcester*, 141 Mass. 58; *Com. v. Kane*, 143 Mass. 92; *Com. v. McDonough*, 150 Mass. 504.

The law says that defendant shall not have these boxes or stalls. It is plain and unequivocal and means exactly what the Legislature intended it to mean. It was in the police power of the Legislature to absolutely forbid the existence of boxes or stalls in saloons. *Met. Board of Excise v. Barrie*, 34 N. Y. 657; *People ex rel. Einsfeld v. Murray*, 4 App. Div. 185, affirmed 149 N. Y. 367; *Bertholf v. O'Reilly*, 74 N. Y. 509.

The real intention of the lawgiver, to be deduced from a view of the whole statute will always prevail over the literal sense of terms. *People ex rel. Gentilesco v. Excise Board*, 7 Misc. 415.

The statute should be accorded a literal or a liberal interpretation as may most effectually avert the apprehended mischief. *People ex rel. Clausen v. Murray*, 5 App. Div. 441; *People ex rel. Cairns v. Murray*, 148 N. Y. 171-3.

Burby & Murdock, attorneys for respondent.

Whether there was an enclosed box or stall or any obstruction which prevented a full view of the entire room by every person present therein, and whether intoxicating drinks were sold therein, was a question of fact for the jury.

Giving the law the construction claimed for it by the plaintiff, yet if the booths did not prevent a full view of the room, by any person present therein, there was no violation of the law.

The evident intent of the Legislature was to prevent the use of booths or stalls for drinking purposes. A thing within the letter of the statute is not within the statute unless within the intent of the lawmakers. *Riggs v. Palmer*, et al. 115 N. Y. 509; *Potter's Dwarrris*, 209-210, case cited; *People ex rel. Mason et al. v. McClare*, 99 N. Y. 89.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred.

Supreme Court, Queens Special Term, March, 1899. Unreported.

In the Matter of the Application of WILLIAM P. WOOD to Revoke the Liquor Tax Certificate of PHILIP H. VICTORY.

GARRETSON, J. The petitioner may institute this proceeding although he owns no dwelling house situated within two hundred feet of the respondent's place of business. The allegation of the petitioner that he "is a citizen of the State of New York" is sufficient. (The Liquor Tax Law, Chap. 112, Laws 1896, § 28, subd. 2, as amended by chap. 312, Laws of 1897).

The respondent stated in his application for the liquor tax certificate that there were no buildings occupied exclusively as dwellings, the nearest entrance to which was within two hundred feet, measured in a straight line, of the nearest entrance to the premises where the traffic in liquors was intended to be carried on by him. It appears by the petition that at the time the application was made there were two such buildings, and that neither of the owners thereof have given the requisite consents. The disposition of this case must follow. In re *Bridge* (25 Misc. 213), affirmed by the App. Div. 2d Dept., and January term, 1899, on opinion of the justice at Special Term.

Petition granted with \$30 costs.

County Court, Monroe County, March, 1899. Unreported.

PEOPLE V. FRANK L. PALMER.

CARNAHAN, SP. CO. J.: The indictment in this case is for a violation of the Liquor Tax Law, and charges that the defendant wilfully and unlawfully, "did, during the hours when the sale of liquors is prohibited, to wit: before five o'clock on Monday morning, have certain blinds and curtains covering the windows and doors, thereby obstructing and preventing a person from having a full view from the sidewalk and street of the bar and room in such buildings, where liquors were then and there kept for sale."

The offense thus charged is a violation of subdivision "h" of section 31 of the Liquor Tax Law, by which persons are forbidden "to have" during the hours when the sale of liquors is forbidden "any screen or blinds, or any curtain or article or thing covering any part of any window, or to have in any window or door, any opaque or colored glass that obstructs or in any way prevents a person passing from having a full view from the sidewalk, alley or road in front of, or from the side or end of the building, of the bar and room, or any part of such bar and room, in such building where liquors are sold or kept for sale."

The question raised by the demurrer is whether the grand jury had authority to inquire into the violation of the provision just quoted. No objection is made that this question cannot be taken by demurrer.

To determine this question it is necessary that reference should be made to a number of sections of the Liquor Tax Law.

Section 34 in five subdivisions, prescribes the penalties imposed for violations of the law.

Subdivision one of that section provides that a person "trafficking in liquors" who is prohibited from so doing, or who has not duly obtained a certificate, or one who traffics in liquors, contrary to the local option provisions of the act, or who neglects or refuses to make application for a certificate or give a bond, or pay the tax, as required shall be guilty of a misdemeanor.

Subdivision 2 of the same section provides that a person who shall make a false statement to obtain a certificate, or who shall be found "trafficking in liquors" contrary to various provisions of the act, shall be guilty of a misdemeanor.

Subdivision 3 relates to forfeiture of liquor tax certificates under certain conditions.

Subdivision 4 forbids the issuing of a certificate to any person convicted of a violation of the Liquor Tax Law within five years from the date of the conviction.

Subdivision 5 denounces as a misdemeanor "any wilful violation by any person of any provision of this act, for which no punishment or penalty is otherwise provided."

Section 35 in two subdivisions, defines the jurisdiction of courts.

Subdivision 1, of that section, confers authority upon the grand jury to inquire by indictment into any violation of the act, penalties for which are prescribed in subdivisions 1, 2, 3, or 4 of section 34, above mentioned, and provides that the trial of such indictment be had in a Court of Record.

Subdivision 2 provides that Courts of Special Sessions shall have exclusive jurisdiction to try complaints for violations of subdivision 5 of section 34 as a misdemeanor.

It, therefore, follows that unless some penalty or punishment for unlawfully maintaining blinds and curtains in violation of subdivision "h" of section 31 is provided in one of the first four subdivisions of section 34, the charge falls within the language of subdivision 5 of that section and can only be prosecuted in a Court of Special Sessions. To find that a penalty for this offense is prescribed in the first four subdivisions of section 34, it is necessary to hold that the unlawful maintaining of blinds and curtains is a "trafficking in liquors" because subdivisions 1 and 2 provide penalties only for "trafficking in liquors" and subdivisions 3 and 4 relate to other subjects not material here.

But it is expressly provided in section 2 of the Liquor Tax Law that whenever the phrase "trafficking in liquor" occurs in the act it means "sale" of liquor in various quantities, or the "distribution" of liquor among members of an association. There are no rules of statutory construction which enable a court to say that within the terms of the definition the maintaining of screens and curtains is a "trafficking in liquors" and, therefore, the offense charged in this indictment is one for which, in the language of subdivision 5, section 34, "No punishment or penalty is otherwise provided" and it is within the exclusive jurisdiction of the Court of Special Sessions to try.

There is little doubt but that the Legislature, in enacting this

law, regarded the forbidden trafficking in liquors as a much graver offense than that of unlawfully maintaining blinds and curtains. So, according to the customary administrations of the criminal law, Courts of Record were given jurisdiction to prosecute the more serious crime by indictment, and the lesser offense was left to the exclusive jurisdiction of Courts of Special Sessions.

If it were to be held that the grand jury had authority to inquire into the crimes of unlawfully maintaining blinds and curtains it would be necessary to make a similar ruling in regard to certain other offenses under the Liquor Tax Law not within the terms "trafficking in liquors" and the result would be that none of the offenses defined by that law would be left within the jurisdiction of Courts of Special Sessions thus defeating the plain intent of the Legislature.

The demurrer should be allowed.

County Court, Ulster County, March, 1899. Unreported.

PEOPLE v. DANIEL HEDDEN.

Defendant was arrested at Tuttlestown, in the town of Gardiner, for violating the liquor tax law, it being alleged that a person in his employ had sold intoxicating liquor to a minor under 16 years of age, and was held by Justice of the Peace Cornelius Freer to await the action of the grand jury. From this order of the justice, Hedden appealed to the County Court.

VAN ETTEN, J. It is contended by the appellant that the allegations in the information and that the warrant were insufficient to give the justice of the peace jurisdiction, and that the proceedings of said justice and his order holding the defendant to await the action of the grand jury can be reviewed upon appeal to this court.

"The right of appeal in criminal cases is statutory only, and in the absence of a statute authorizing an appeal in a given case, no appeal can be taken." (*People v. Tressa*, 128 N. Y. 532.)

Section 515 of the Code of Criminal Procedure provides that

writs of error and of certiorari in criminal actions, etc., are abolished. "And hereafter the only mode of reviewing a judgment or order in a criminal action, or special proceeding of a criminal nature, is by appeal." This section is limited by and must be construed with section 517 of said code, which provides: "In what cases appeal may be taken by defendant. An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after indictment," etc. This case does not come within the provisions of either of those sections.

In part V, title 111, of the Code of Criminal Procedure, entitled "of appeals from Courts of Special Sessions," section 749 provides as follows: "A judgment upon conviction, rendered by a Court of Special Sessions, Police Court, police magistrate or justice of the peace, in any criminal action or proceedings or special proceeding of a criminal nature, including a judgment of commitment made under section 291 of the Penal Code, may be reviewed by the County Court of the county, upon an appeal as prescribed by this title, and not otherwise," etc. This appeal is not from a judgment of conviction or a judgment of commitment made under section 291 of the Penal Code, and therefore is not within the provisions of section 749 of said code.

Without passing upon the sufficiency of the information, warrant and evidence, I am of the opinion that this appeal is not authorized by statute, and it is accordingly dismissed.

Supreme Court, Onondaga Special Term, March, 1899. Reported.
26 Misc. 568.

Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate Issued to MAE A. BALDWIN.

Liquor Tax Law—Consents—"Dwelling" defined.

A building is used exclusively as a dwelling, within the meaning of the Liquor Tax Law (Laws of 1896, chap. 112) as applicable to the consents of owners, where it as a whole is, in its general and preponderating use, designed for and devoted to occupation as a dwelling, and to the exclusion of any distinct portion thereof being openly and habitually devoted to some other purpose, as that of business.

Semble, that a building is used exclusively as a dwelling, within the meaning of the statute, where it was built after a business block to which it forms an addition, where it does not communicate with the rest of the block, has a separate street number and is used exclusively as a flat for dwelling purposes.

THIS application is made to revoke defendant's license upon the ground that her application contained false statements in reference to the number of buildings used as dwellings within the prescribed distance of her saloon and that consents of a sufficient number of owners of dwellings were not obtained.

The defendant stated that there were three buildings used for dwellings within the distance named by the statute and filed the consents for two thereof. It is now claimed by the petitioner that there was a fourth building used as a dwelling which should have been counted in obtaining consents. The defendant denies that this building was exclusively used as a dwelling and also claims that one of the three buildings mentioned in her petition as being used for dwelling purposes was not as a matter of fact so used, and therefore should not be counted upon this question, and that if not so counted she had sufficient consents even though the one claimed by petitioner is taken into account.

S. B. Mead, for petitioner.

Edgcomb & Rafferty, for defendant.

HISCOCK, J. The building which it is claimed by petitioner should be counted as being used exclusively for a dwelling is and at the time of defendant's application for a certificate was occupied by one Mrs. Pearl, who lived there with her nephew. It was a one-story brick house with a basement. The upper floor consisted of a front room occupied as a sitting-room with a bedroom and clothes-press off from the main room, and a kitchen with a bedroom off. The basement was entered either from the upper story or from the street, and was ordinarily used by her for the storage of fuel. There seems to have been stored there also for the accommodation of some neighbor an old stove and possibly some other things. Mrs. Pearl was a washerwoman and she was accustomed to take in family washing, which was done in the kitchen, there being sometimes three or four or five washings a week. This was done without machinery of any kind, such as would be found in a public laundry. There was no

business sign of any kind upon the house, which in its appearance and aspect, so far as the evidence disclosed, was an ordinary dwelling-house, used for dwelling purposes.

I do not think that this use by the occupant of what was manifestly her dwelling-house and place of abode for doing occasional washing sustains defendant's contention that this was not a building used exclusively for a dwelling within the meaning of the statute, as it seems to me the provision of the statute in question means a building, all of which, considered as a whole, in its general and preponderating use, is designed for and devoted to occupation as a dwelling, as a dwelling of its kind would be ordinarily used, and to the exclusion of any distinct portion thereof being openly and habitually devoted to some other purpose, as that of business. If a distinct part of the building in question had been dedicated by a sign or otherwise to use as a public laundry or storehouse, and the public had come and gone to and from it in the manner in which people do use such a public place, defendant's contention might be well founded. But such was not the case. The house was planned and occupied primarily as a dwelling-house, and when certain rooms were not in use for domestic purposes they were used by the occupant for doing certain work. This use was of the manner in which rooms in a dwelling-house would be used, rather than that which would attend the use of a public place of business. It could not have been the intention of the Legislature that a person's dwelling-house should lose the benefit of this provision because occasionally or even habitually the occupant, as a lawyer, devoted a room intended and used as his private library to working upon his cases, or as a washerwoman, devoted the room intended and used for her kitchen to doing some of her washing.

The other question arises over the building designated in the evidence at No. 1516 South Salina street, and owned by one Durango. In her original application for a license defendant treated this as coming within the provision of the statute relating to buildings used for dwelling purposes, but she now seeks to establish that it was not such a building, and, therefore, should not be counted.

In view of the conclusion which I have reached about the character of this building, it is unnecessary to decide whether the defendant at this time can reverse the position which she took upon her original application for a certificate and establish that

a building then treated as occupied for dwelling purposes was not in fact so occupied or entitled to be treated.

The building in question did come within the provisions of the statute in my judgment. It seems that there was what would be ordinarily known as a block of several buildings of which the one in question was at one end. Some of the divisions of this entire structure were concededly used for business purposes, and if the structure is to be regarded as an entire building it manifestly was not used exclusively for the purposes of a dwelling, but I do not think it is to be so treated. It appears by the evidence that the structure outside of the division in question was first built and that then this building or division was added on. What had been used for the end wall before now became a division wall between the old and the new structure. For one story at least the two buildings did not come together, and above that they were separated by a partition wall. There was no communication inside between the new addition and the old building. The roofs did not evenly join on to each other, one being higher than the other. The parts of the old building and the new division had separate street numbers, and the new part or building in question at this time and at the time of defendant's application and always was used exclusively as a flat for dwelling purposes. I have no doubt but what, under these circumstances, it is to be treated as a separate and distinct building, used exclusively for dwelling purposes. The petition is granted, with costs.

Petition granted, with costs.

Court of General Sessions of the Peace, New York County, March, 1899.
Reported. 26 Misc. 585.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* HARRY R.
WADE and Twenty-seven Other Applications.

1. Crimes—A misdemeanor is not entitled to a jury trial.

A person charged with a misdemeanor has no constitutional right to a trial by jury.

2. Same—Transfer of misdemeanors from the Special to General Sessions.
in New York city, disapproved.

The Court of Special Sessions has, in the city of New York, exclusive jurisdiction of the trial of misdemeanors unless a justice of the Supreme

Court or of the Court of General Sessions shall certify that it is reasonable that the trial shall be prosecuted by indictment, but, in order to justify such a certificate and transfer, it should be made to appear that some cause exists which is likely to prejudice the rights of the accused or injuriously affect the impartial administration of justice, or else that exceptional and important questions are involved which justify a trial by indictment in a court of record.

The practice of procuring the transfer of charges of misdemeanor, merely for the purpose of delaying the trial, disapproved.

APPLICATION by defendant for an order that the charge against him be transferred to the Court of General Sessions and be prosecuted by indictment.

E. Y. Bell, for application in title case.

Asa Bird Gardiner, district attorney, opposed.

GOFF, R. The defendant is charged with the commission of a crime of the grade of misdemeanor, and has been held by the committing magistrate for trial in the Court of Special Sessions. He now makes application for an order that the charge against him be transferred to the Court of General Sessions, and be prosecuted by indictment.

The claim that a person charged with a misdemeanor has a constitutional right to a trial by jury was decided adversely by Beekman, J., in *People v. Levy*, 24 Misc. Rep. 469, and to the same effect in *People v. Wolf*, id. 94, and *People v. Seaman*, Supreme Court, Special Term, Queens county, 1898.

Exclusive jurisdiction to hear and determine in the first instance all charges of misdemeanor committed in the city of New York, except charges of "libel," is conferred upon the Court of Special Sessions by section 1406 of the Greater New York charter (Chap. 378, Laws of 1897), unless a justice of the Supreme Court or a judge of the Court of General Sessions "shall certify that it is reasonable that such trial shall be prosecuted by indictment." The plain meaning and intent of this saving clause of the statute is that Courts of Special Sessions have exclusive jurisdiction for the trial of cases of misdemeanor, unless for reasonable cause they are divested of that jurisdiction. Where jurisdiction is conferred upon a court, the presumption of law is that it will be properly and justly exercised, and before that presumption can be disturbed, it should be made to appear that

there exists some cause which is likely to be prejudicial to the rights of a party or to injuriously affect the fair and impartial administration of justice, or that there are involved exceptional and important questions which a trial of by indictment in a court of record would be seemly and proper. When it is satisfactorily made to appear that such cause exists, then the presumption is disputed, and it becomes "reasonable" that the relief provided by the statute should be granted, and not until then.

The power to oust a court of jurisdiction which it has acquired is to be exercised with discretion and not arbitrarily. In accord with this principle, the statute declares that as a necessary prerequisite to the removal of a case from the Special Sessions, the judge shall certify that it is reasonable that the charge should be prosecuted by indictment. The judge is required to do an act which is judicial and not ministerial. He is in reality to certify that because of the existence of certain things or causes he deems it reasonable that the trial of a case should be had in a court different from the one in which jurisdiction was exclusively vested in the first instance. Can this certification be made without that discernment and discrimination of things and causes which are essentials of judicial discretion? It is necessary, therefore, that there should be presented for the judge's consideration some evidence of things or causes which will enable him to correctly and prudently exercise judicial discretion.

What does the affidavit on this application set forth? That the defendant was accused of a misdemeanor before the magistrate; that on that charge he was held to bail by the magistrate for trial at the Court of Special Sessions; that he is not guilty of the charge; and that he desires the charge to be prosecuted by indictment. The first two allegations are merely recitals of acts of procedure. The third and fourth allegations only are pertinent to the questions under consideration.

When the defendant was arraigned before the magistrate he answered that he was not guilty of the charge. This plea was a complete denial and insured to him a trial of the facts alleged against him. The law does not require that such a plea be made under oath, but it gives to it all the force and effect which a verified pleading can possibly have. For all the purposes of trial, the defendant's plea was complete and effective. What additional virtue, then does his affidavit of innocence give to his plea of

innocence? Is it not a mere reassertion of that which has been already asserted with full legal force and effect? It certainly does not enlighten the judge to whom he applies for removal of his case any more than his plea of not guilty enlightened the magistrate who held him for trial. True or false, his affidavit can produce no other or different result from that which his plea can. If false, or wilfully false, perjury cannot be predicated upon it because the essential elements of perjury are lacking. It is difficult to conceive an averment under oath more meaningless and inefficacious than this.

The fourth allegation that the defendant "desires" the removal of the case is not worthy of serious consideration. If the "desires" of persons charged with crime were acceded to, very few criminal courts would be required.

From the 1st day of July, 1895, when the present Court of Special Sessions was instituted, and the law providing for the removal of cases to the Court of General Sessions went into effect, there have been removed 4,398 cases of misdemeanor. From the 1st of January, 1898, to the 1st of February, 1899, there were removed 1,157 cases, of which number but eighty-three cases were tried. This is a fair average of the number of cases tried for the whole period of time mentioned, and which shows that 7 per cent of the cases removed have reached trial.

It is a matter of common knowledge that in the great majority of cases removed from the Court of Special Sessions the object is not to obtain a speedy trial, but to get away from one, and through the delays consequent upon the great amount of business before the grand jury, the accumulation of indictments in the district attorney's office, and the necessity pressing upon the Court of General Sessions to give preference to the trial of felonies and prison cases, to circumvent the law and practically, in a wholesale manner, obstruct the administration of justice.

"To carry out effectually the purpose of the law, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined. Courts must labor to suppress all subtle innovations and circumlocution by which the object and purpose of the law will be defeated." *Magdalen College Case*, 11 Rep. 70 b; *Cooley v. Bancroft*, 43 N. J. Law, 363; *Woodruff v. State*, 3 Ark. 285.

At a time when the grand jury has barely sufficient time to give due consideration to the important cases which are pre-

sented, when there are nearly 2,000 untried indictments in the district attorney's office, and when there are many prisoners in the city prison awaiting trial for the highest grade of felonies, this practice of making indiscriminate applications to remove cases of misdemeanor from a court which was specially instituted by law to afford a prompt and speedy trial should not, in the interests of justice and the due administration of the law, be encouraged.

The application at bar has no merit whatever and it is, therefore, denied; and this ruling applies to each of the twenty-seven other applications of similar character.

Application denied. _____

Supreme Court, Monroe Trial Term, March, 1899. Reported. 26 Misc. 594.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Plaintiff, *v.* ERNEST BRUCKER and THE TITLE & GUARANTEE CO. OF ROCHESTER, Defendants.

1. Liquor Tax Law—A bond not to violate the statute, "or any act amendatory thereof," is valid.

A bond which, in the terms of the statute (Laws of 1896, chap. 112), binds an applicant for a liquor tax certificate not to violate any of the provisions of the Liquor Tax Law, and, in addition, "or any act amendatory thereof or supplementary thereto" is to be deemed to refer only to such amendments as were in force when the bond was executed, and in this view sureties who signed it with knowledge of its contents, can not, after it has been accepted as a valid security, attack its validity upon the ground that it is more burdensome to them than the statute requires.

2. Same—Maintenance of a nickel slot machine is a breach of the bond.

A saloonkeeper who maintains a nickel-slot machine for public use is guilty of a violation of the condition of his bond that he will not suffer or permit any gambling to be done in the place where he is authorized to traffic in liquor.

ACTION upon a bond given upon an application for a tax certificate under the Liquor Tax Law.

Elbridge L. Adams, for plaintiff.

George F. Yeoman and George H. Harris, for defendants.

DAVY, J. The two principal questions presented and argued upon the motion for a nonsuit in this action are: First, That the bond upon which this action is based is void, because the statute requires that it shall contain a statement that the applicant shall not violate any of the provisions of the Liquor Tax Law, while the bond in suit requires him not to violate any of the provisions of the Liquor Tax Law or any act amendatory thereof or supplementary thereto. Second, That the evidence does not show that the defendant Brucker suffered or permitted any gambling to be carried on upon his premises contrary to the provisions of said bond.

It seems to me that the words "or any act amendatory thereof or supplementary thereto" refer to the original Liquor Tax Law and the amendments thereto in force at the time the bond was executed, and not to any amendments enacted thereafter. If I am right in my contention then the additional words are not in the least prejudicial to the rights of the defendants because they do not impose any greater obligations or make the bond any more burdensome to the defendants than the statute requires. A strict and technical conformity to the statute is not essential to the validity of the bond. If it conforms substantially to the form prescribed it is sufficient; neither is it any objection to the bond that it is broader in its terms than is required by the statute, so long as it does not vary therefrom to the prejudice of the rights of the defendants.

Section 729 of the Code of Civil Procedure expressly provides that "A bond or undertaking required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit it is given." The plaintiff is not attempting to recover under any amended act of the Legislature passed after this bond was given. He sues for a violation of it under the Liquor Tax Law existing at the time it was executed. Assuming that the bond did not conform in all respects to the requirements of the statute, I am inclined to think that the defendants, after having presented it to the commissioner of excise as a lawful and valid security, who accepted it, and who upon the strength of the security granted a liquor tax license to the defendant Brucker, who has received all the rights and benefits therefrom, that

neither he nor his surety ought to be permitted to escape liability because the bond does not conform to the exact language of the statute, neither should the court, upon technical grounds, aid them in escaping the consequences of a plain violation of its conditions. The defendants knew, or ought to have known, the contents of this bond when they executed it, and if the additional clause referred to was in the least prejudicial to them, they should have refused to sign it, or, after it was executed, they should have applied to the court under section 730 of the Code of Civil Procedure to have it amended. That section provides that "Where such a bond or undertaking, is defective, the court, officer, or body, that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if it was perfect, may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution." This section contemplates that where a statutory bond is taken for the benefit of a party, which does not comply with all its requirements, even in substance, it may be amended at the election of the party who executed it, by applying to the court. *Irwin v. Judd*, 20 Hun, 562. The obligors, however, may waive that condition, and if they neglect to institute proceedings to have the bond amended until an action is brought upon it, knowing that the principal has obtained rights and privileges upon the faith and strength of it, they are estopped from questioning its validity. It would be unjust under these circumstances to permit them to repudiate their obligation.

In the case of *People ex rel. Meakin v. Eckman*, 63 Hun, 209, the court held that "Where the commissioners of excise, as a condition to issuing a license to sell liquor, require a bond to be given that the licensee should not suffer his place of business to be disorderly, that the obligors are estopped from questioning its validity." It has frequently been held that parties to a bond or undertaking may waive the formalities required by the statute and thus become estopped from asserting or proving its invalidity. *Adee v. Adee*, 16 Hun, 49; *Ring v. Gibbs*, 26 Wend. 502; *Harrison v. Wilkin*, 69 N. Y. 413; *Shaw v. Tobias*, 3 id. 188; *Decker v. Judson*, 16 id. 442; *Metropolitan Life Ins. Co. v. Bender*, 124 id. 47.

The next question is, whether the defendant Brucker violated the conditions of the bond by suffering or permitting any gam-

bling to be done in the place designated by the tax certificate in which he was authorized to carry on the traffic of liquor.

The complaint alleges that he suffered and permitted gambling upon his premises, in permitting to be maintained and used an electric nickel-slot machine and a penny-slot card machine, by which the public might and did game and play for money by chance. That by reason of said breach of the bond the defendants became and are indebted to the people of the State of New York in the sum of \$1,000. So that the question presented is, did the defendant Brucker violate the statute by keeping what is commonly known as a nickel-slot machine in his saloon and permitting it to be used by the public or those who visited his premises?

Section 344 of the Penal Code provides that "A person who is the owner, agent or superintendent of a place, or of any device or apparatus for gambling; or who hires, or allows to be used a room, table, establishment or apparatus for such a purpose; or who engages as dealer, game keeper, or player in any gambling or banking game, where money or property is dependent upon the result; * * * is a common gambler." Subdivision 7 of section 899 of the Criminal Code also provides that persons who keep, in a public highway or place, any apparatus or device for the purpose of gambling, or go about exhibiting tricks or gaming therewith, are disorderly persons.

It appears from the testimony of the agents of the excise department that the defendant kept in his saloon, where he was licensed to sell liquor, a slot machine, which was kept loaded with nickels, and anyone coming into the saloon could drop a nickel into the slot of the machine and press a plunger or turn a crank so that the nickel dropped in would fall, and by some sort of contrivance or arrangement inside of the machine it might fall into certain compartments and nothing would come out, whereby the nickel dropped in would be lost to the person playing or using the machine; or by chance it might fall into some other compartment whereby a certain number of nickels with which the machine was loaded would drop out and be won by the player. The inside working of the machine is not very clearly or minutely described by the witness, but it appears from the evidence that the agents operated it successfully. Sometimes when they dropped a nickel in the slot they would lose, and at other times they would win. By this operation one or the other of the parties must expect to

profit by the game. Each party gets a chance of gain from the other and he takes the risk of losing his own money.

To adopt the theory advanced by the learned counsel for the defendant Brucker would enable parties by ingenious arrangements not only to thwart the purpose of the statute, but to avoid it altogether. The Constitution of the State, article I, section 9, provides, that no gambling of any kind shall be authorized or allowed within the State. The manifest purpose of the Legislature in its various enactments on the subject of gambling and gaming, which are synonymous terms, was to carry out the plain requirements of the Constitution and to make unlawful all games of chance by which money or other articles of value may be lost or won. Gambling as defined in the Century Dictionary is "to play at any game of hazard for a stake; risk money or anything of value on the issue of a game of chance by either playing or betting on the play of others."

"It is evident that gambling devices include all instruments, implements, devices or means which are made and used in unlawful gaming."

In *State of Minnesota v. Grimes*, 49 Minn. 446, the court held that "A gambling device may be defined as an invention or contrivance to determine the question as to who wins or who loses his money on a contest of chance."

In the case of *Portis v. State*, 27 Ark. 362, it was held that "A gambling device may then be defined to be an invention to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind."

Entertaining these views, I must deny the motion for a nonsuit as to both defendants.

Motion denied.

Supreme Court, New York Special Term, March, 1899. Reported,
26 Misc. 611.

Matter of the Application of PATRICK C. FALL for the Revocation
of a Liquor Tax Certificate.

**Liquor Tax Law—Certificate revoked for material false statement—
Intent immaterial.**

A liquor tax certificate must be revoked where the falsity of the statement of the applicant, that he was the only person interested or to be interested in the business, is shown by his own testimony in subsequent supplementary proceedings, and the court can not go into the question whether or not his testimony was intentionally false and given to deceive the excise authorities.

MOTION to revoke a liquor tax certificate.

C. C. Leeds, for motion.

E. C. Baldwin, opposed.

GILDERSLEEVE, J. This is an application, under section 28, subdivision 2, of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897, to revoke and cancel a liquor tax certificate issued to one Patrick Meehan. The statute provides that any citizen of the State may petition this court for an order canceling a certificate, on the ground that material statements in the application of the holder were false, etc., and that if the court is satisfied that material statements in the application of the holder of the certificate were false, an order shall be granted revoking and canceling such certificate. In the present case, it appears from the sworn statements of the holder, Meehan, in his application, that he represented himself as the only person interested, or to become interested, in the business under the certificate applied for. Subsequently, and after the certificate had been issued to him, upon such application and the statements therein made, he swore, in supplementary proceedings, that his brother was the only person interested in the said business, and that he, the holder of the certificate, had never had any interest in the business beyond receiving his salary as a barkeeper for his brother. Voluminous testimony was taken before a referee upon this application to revoke the license, and an effort was made to explain away the statements made in the examination on supplementary proceedings. The question is not whether Meehan intentionally made a false statement in his application for the

certificate with a purpose of deceiving the excise authorities, but simply whether or not material statements in the application were false. Section 17 of the statute provides, in subdivision 2, that the application must contain a statement of the name and residence of every person interested, or to become interested, in the traffic of liquors for which the statement is made. The Appellate Division of this department, in the case of *People ex rel. Belden Club v. Hilliard* (28 App. Div. 140), held that the right of an applicant to a liquor tax certificate is made to depend altogether upon the statements contained in his application therefor, and that the officer has no discretionary power in the matter. Both Meehan and his brother, on examination in the supplementary proceedings, swear that the brother, and not Meehan, was the person interested in the business. The counsel for the holder, Meehan, however, maintains that owing to the testimony taken before the referee, it is not established, beyond a reasonable doubt, that Meehan was guilty of false representations, and that, therefore, he should be given the benefit of the doubt and this application denied. In support of this contention, he quotes the case of *People v. Owens*, 148 N. Y. 648. That, however, was a case in which Owens had been convicted in a criminal court of selling liquor on Sunday, and the Court of Appeals held that the general rules of evidence applicable to criminal cases governed that case. Here, Meehan is not on trial for a criminal offense; and, as I have above pointed out, the only question to be determined is whether his said statement in his application for the certificate was, in point of fact, false. Whether he intentionally, and with a view to deceive, made false representations to the excise authorities, is a question which I am not called upon to decide. It seems to me that under the evidence presented, I must hold that the statement made to the excise officer upon the application for the certificate, to the effect that Meehan was the only person interested or to become interested in the business was false, and that this application for the cancellation of the certificate must be granted. Whatever may have been the motives by which the petitioner Fall has been actuated in instituting these proceedings, it is the duty of the court to comply with the requirements of the statute, without regard to any feelings of rancor and spite between the parties. The application is granted.

Application granted.

Supreme Court, Orange Special Term, March, 1899. Reported. 26 Misc. 629.

Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, for an Order Enjoining HANS P. BRADSTED from Trafficking in Liquor Contrary to the Provisions of the Liquor Tax Law.

Liquor Tax Law—Enumeration for excise tax—What may be included within one limit or boundary line.

In establishing a limit or boundary line around a hamlet or unincorporated village within which limit or boundary line an enumeration may, under subdivision 7 of section 11 of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897, be taken by the State Commissioner of Excise for the purpose of establishing the amount of the excise tax, the commissioner may properly include a little settlement which, locally, has its own name, but which, practically, forms part of an unincorporated village and has no post-office nor any stores of its own.

Seemle, that the commissioner may include several hamlets within a single limit or boundary if they are so close together as to constitute, for all purposes of trade and association, a single community.

He may lawfully take an enumeration of the inhabitants of an unincorporated village situated partly within a township where traffic in liquor is permitted and partly in a township where it is prohibited.

PROCEEDINGS under the Liquor Tax Law, restraining the respondent from trafficking in liquor contrary to the provisions of said law.

William E. Schenck (Walter S. Jenkins, counsel), for petitioner.

Frank P. Demarest, for respondent.

HIRSCHBERG, J.: For the purpose of ascertaining the number of inhabitants in order to determine the amount of excise tax to be assessed under the Liquor Tax Law (Chapter 112 of Laws of 1896, as amended by chapter 312 of Laws of 1897) subdivision 7 of section 11 of that law provides as follows: "When the population of a city or village is not shown by the last State census, it shall be determined for the purposes of this act by the last United States census, and if not shown by reason of the incorporation of a new city or village, or by reason of not having been separately enumerated, the state commissioner of excise is

authorized and directed to cause an enumeration of the inhabitants to be taken in such city or village, if the commissioner has any doubt as to the number of the population as affecting the amount of the excise tax assessed therein. He may also cause to be taken an enumeration of the inhabitants of any hamlet or unincorporated village, after first having established a limit or boundary line around such hamlet or unincorporated village, within which limit or boundary line such enumeration may be taken. Whenever a limit or boundary line shall have been established around any hamlet or unincorporated village, such limit or boundary line shall be described and certified to by the state commissioner of excise and be entered of record and become part of the records of the state department of excise, and such limit or boundary line shall not be changed for a period of five years after the date of recording the same, except such hamlet or unincorporated village become an incorporated village with corporate limits and boundary lines different from those established by the state commissioner of excise, in which case such newly incorporated village may be enumerated as hereinbefore provided in this section."

Pursuant to this provision the state commissioner of excise caused an enumeration of the inhabitants of the unincorporated village of Spring Valley in Rockland county to be duly taken in the month of February, 1898, having first established a limit or boundary line around said village. The proceedings of the commissioner were correct and legal in every respect and proper maps were filed and a suitable public record made. The premises of the respondent Hans P. Bradsted are within the boundary so established. The enumeration disclosed the fact that the unincorporated village so limited and bounded contained over 1,800 inhabitants and being in excess of 1,200, the amount of excise tax within said village was determined to be the sum of \$200, under the provisions of the Liquor Tax Law. In the latter part of the month of April, 1898, Bradsted obtained a liquor tax certificate from the county treasurer for the sum of \$100, on the representation made by him at the time, that his place was not within the limit or boundary so established by the commissioner, but that it was in a separate village or hamlet from that of Spring Valley, and known as Heyengaville. The license conferred by this certificate will expire April 30, 1899, and these proceedings are taken to enjoin Bradsted from trafficking under it.

The evidence does not disclose the existence of any separate community known as Heyengaville. The locality is on the south-east corner of Spring Valley, was first known as Dutch Factory, afterwards locally as Heyengaville, from the name of the purchaser (Heyenga) of the factory, but is not in any sense a separate and distinct hamlet. There is no apparent break or vacancy between the conceded part of the unincorporated village of Spring Valley and the place in question, and all is built up in the general village style. There is no post-office and no stores located among the cluster of houses which Bradsted calls Heyengaville. There is a factory, the premises of a charcoal burner, and a dozen or more tenement-houses, but on the surface the entire inclosure within the limit or boundary created by the commissioner is apparently one community. Bradsted has a box in the Spring Valley post-office and his name appears in the Spring Valley directory as that of the keeper of a saloon on Central avenue. In view of the object to be accomplished namely, that of establishing a proper fee or tax to be paid by the applicant for a certificate entitling the holder to traffic in liquor, it is evident that the commissioner has only included one unincorporated hamlet or village in the limit established, within the meaning of the law. If, however, Heyengaville is to be regarded as a separate community or unincorporated village, I am still of the opinion that the commissioner may include several hamlets within a single limit or boundary, so long as they are so close together as to constitute, for all purposes of trade and association, a single community. Nor should the court interfere, unless in a case where the action of the commissioner indicated a palpable abuse of the discretion vested in him by law to the prejudice, in some way, either of the applicants for permission to traffic in liquor, or of the communities affected.

Central avenue, which divides the village of Spring Valley as actually built up and as established by the commissioner, is on the dividing line between the towns of Ramapo and Clarkestown. As a consequence one-half of the village is included in the town of Ramapo and the other half in the town of Clarkestown. At the time of the enumeration trafficking in liquor was permitted in the town of Clarkestown, but forbidden in the town of Ramapo by vote of the electors of these towns respectively, and the legality of the commissioner's action is assailed in these proceedings for that reason. I do not think the circumstance affects the validity

of the commissioner's act. There is nothing in the law to prevent an enumeration being taken of the inhabitants of an unincorporated village situated partly within a township where trafficking in liquor is permitted and partly in a township where it is prohibited. The object is simply to ascertain the number of inhabitants in a settled community for the purpose of determining the proper and equitable tax to be paid by any one who may, under the provisions of the law, be permitted to carry on the sale in said community. The premises of Bradsted are located in the town of Clarkestown and the sale of liquor was permitted in that town at the time he applied for and procured the certificate. The fact that liquor could not be sold in that part of the village included within the township limit of Ramapo was not in any sense an injury to him. On the contrary, the tendency of that fact was to limit competition without lessening custom. The designation of the limits of an unincorporated village is to continue for five years, while the voters are at liberty to change the policy of the town every two years. It is quite apparent that the Legislature must have had in view the possibility that a different policy might prevail with respect to the sale of liquor in different portions of an unincorporated village, under the provisions of the act, where such village is located in more than one town. The absence of any provision limiting the power of the commissioner to establish a boundary line around such a village must be deemed conclusive. On the other hand, the existence of such power does not conflict with any of the other provisions of the law. The taxes assessed are not to be apportioned in any event to the village or hamlet, but will go to the town in which the dealer or licensee resides. § 13.

I have examined the other questions presented on this application, but do not regard them as worthy of extended consideration.

The order prayed for should be granted.

Order granted.

First Appellate Department, March, 1899. Reported. 38 App. Div. 220.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, v. YOUNG MEN'S COSMOPOLITAN CLUB, Defendant, and FIDELITY AND DEPOSIT COMPANY of Maryland, Respondent.

Taxation, in each of four actions, of mileage for the same witnesses—

Papers which may be used on a motion for a retaxation of costs.

Where, in four actions upon similar bonds, given by a club as principal, and signed by a surety company, under the Liquor Tax Law, all of which appeared upon the day calendar for trial at the same time, four bills of costs are presented for taxation at the same time under four judgments in favor of the State Commissioner of Excise, in each of which mileage fees are taxed for the same witnesses, the clerk is not justified in refusing to tax the mileage of such witnesses in each case because the surety company objects that "it was not proper to tax more than one mileage for each witness, and inasmuch as the four bills of costs were before the court for taxation at the same hour, the clerk should look at the bills of costs and strike therefrom the names of any witnesses whose mileage had been already taxed in any one of the four causes," in the absence of proof in contradiction of the statement in the affidavits attached to the several bills of costs that "each of the persons above named as witnesses attended as such witness on the trial of said action the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names from the place of said trial, and that each of said persons as such witness, as aforesaid, necessarily traveled the number of miles so set opposite their names in traveling to, and the same distance in returning from, the same place of trial."

Upon a motion for a retaxation of costs it is improper to use any other papers than those used before the clerk, except such as may be necessary to show his action; and it is irregular for the court to receive and consider, after the motion has been heard, an affidavit of the attorney of the moving party, presented without the knowledge of his opponent, which in some respects involves the merits of the clerk's ruling.

APPEAL by the plaintiff, Henry H. Lyman, as State Commissioner of Excise of the State of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of January, 1899, denying the plaintiff's motion for a retaxation of costs.

Royal R. Scott, for the appellant.

Charles L. Kingsley, for the respondent.

McLAUGHLIN, J.: This action was brought to recover upon a liquor tax bond, given by the defendant club as principal with the defendant Fidelity and Deposit Company as surety. Three other actions upon similar bonds were commenced by the plaintiff against other defendants, and the four appeared upon the day calender for trial at the same time. In each action the plaintiff recovered a judgment, and he thereafter served in each a bill of costs verified in the usual form as to disbursements, together with a notice of taxation. The taxation of costs in each action was noticed at the same hour before the same taxing officer. When the taxation of costs in this action was taken up, the defendant Fidelity and Deposit Company objected to the clerk's taxing the mileage of certain witnesses upon the ground that "it was not proper to tax more than one mileage for each witness, and inasmuch as the four bills of costs were before the court for taxation at the same hour, the clerk should look at the bills of costs and strike therefrom the names of any witnesses whose mileage had been already taxed in any one of the four causes." The objection was sustained, the clerk refusing to tax the mileage of seven witnesses amounting in the aggregate to \$162.16. The plaintiff excepted to this ruling and thereafter applied to the Special Term for an order directing a retaxation. The application was denied, and the plaintiff appealed. Upon the papers before the clerk, the plaintiff was clearly entitled to have the items which were disallowed taxed. The affidavit attached to the bill of costs was the usual one. It stated that the disbursements had been made or incurred in the action; that "each of the persons above named as witnesses, attended as such witness on the trial of said action the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from, the said place of trial." No objection was made as to the sufficiency of the affidavit and the facts therein stated were not contradicted in any way. Indeed, this was the only evidence before the clerk, and it was *prima facie* sufficient to entitle the plaintiff to have the items taxed. The defendant contented itself in making an oral objection that the same mileage fees had been taxed and allowed to the plaintiff in another action. But what of it? If, in some other action, the plaintiff had taxed

similar items, it was presumably because he was entitled to them, and that fact, of itself, did not disprove the evidence then before the clerk showing that he was entitled to the items sought to be taxed here. If there was any reason why the plaintiff was not entitled to tax the mileage of the witnesses referred to, it was incumbent upon the defendant to present legal evidence of that fact to the clerk in order that he might judicially pass upon and determine the question. This the defendant, however, did not do, and all the evidence that there was before the clerk was the affidavit of the plaintiff's attorney, and this, as we have seen, necessarily required the clerk to tax the items objected to.

A motion for a retaxation of costs must be made to and heard by the Special Term on the same papers used before the clerk. It is improper to use any other papers, except so far as they may be necessary to show the clerk's action. This is so for the reason that the motion for retaxation is in the nature of an appeal from the action of the clerk. The objection made by the defendant being oral, it was proper for the plaintiff, upon his motion for a retaxation, to show by affidavit just what took place before the clerk; but this did not involve the merits of the clerk's action, and it did not entitle the defendant to present an affidavit touching the merits. It appears, however, from the record before us that, after the motion had been heard and without any notice to the plaintiff, an affidavit, made by the defendant's attorney, was presented to and considered by the Special Term, which in some respect involved the merits of the clerk's ruling. This was clearly irregular. The defendant was not entitled to use such an affidavit, and certainly not without the consent of the plaintiff after the motion had been argued, and the Special Term ought not to have then received or considered it.

Upon the papers presented, the plaintiff was entitled to have taxed the items which were disallowed, and it, therefore, follows that the motion for a retaxation should have been granted. We are, however, of the opinion that the defendant should have an opportunity to be heard upon the merits, and, therefore, the order of the Special Term should be reversed and a new taxation directed before the clerk, with leave to either party to use, upon such new taxation, such additional affidavits or papers as may be necessary and proper.

The order should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and INGRAHAM, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

First Appellate Department, March, 1899. Reported. 38 App. Div. 629.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* TRUE FRIENDS SOCIAL AND LITERARY CIRCLE and FIDELITY AND DEPOSIT CO. OF MARYLAND, Respondents.

APPEAL in this action from an order denying plaintiff's motion for a retaxation of costs.

Mr. Royal R. Scott, for appellant.

Mr. Charles L. Kingsley, for respondents.

PER CURIAM. The question presented on the appeal from the order in this action is the same as the question presented and determined in *Lyman v. Young Men's Cosmopolitan Club, et al.*, and for the reasons there stated the order must be reversed and a new taxation directed before the clerk, with leave to either party to use upon said new taxation such further affidavits or papers as may be necessary and proper.

The order should be reversed with \$10 costs and disbursements and the motion granted with \$10 costs.

First Appellate Department, March, 1899. Reported. 38 App. Div. 630.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* UNITY LEAGUE AND AMERICAN SURETY COMPANY OF NEW YORK, Respondents.

APPEAL in this action from an order denying plaintiff's motion for a retaxation of costs.

Mr. Royal R. Scott, for appellant.

Mr. R. H. Towner, for respondents.

PER CURIAM: The question presented on the appeal from the order in this action is the same as the question presented and determined in *Lyman v. Young Men's Cosmopolitan Club, et al.*, and for the reasons there stated the order must be reversed and a new taxation directed before the clerk, with leave to either party to use upon said new taxation such further affidavits or papers as may be necessary and proper.

The order should be reversed with \$10 costs and disbursements and the motion granted with \$10 costs.

Supreme Court, Dutchess County, April, 1899. Unreported.

HENRY H. LYMAN *v.* JAMES COYLE and FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

PHILLIPS, Referee.

The defendant Coyle held a liquor tax certificate and the defendant the Fidelity and Deposit Company is the surety upon his bond. The condition of the bond was, among other things, that he should not, during the term of his certificate, suffer his place of business to become disorderly. The testimony shows with so great a preponderance as almost to amount to uncontradicted evidence that Coyle's place was the resort of lewd women, who there conducted themselves in a disorderly manner,

sitting upon the laps of the men and otherwise acting in a lewd and boisterous way—in particular as one instance is testified to when a woman was almost entirely stripped of her clothing in plain daylight in a concert hall forming a part of the defendant Coyle's place.

The defendant Coyle having during the term covered by the bond suffered his place of business to become disorderly, this constitutes a breach of the condition of the bond.

“In case of any violation of the law by a holder of a liquor tax certificate who has given a bond as provided for in section 18 of the act, a civil action may be maintained against the obligors upon said bond to recover the penalty of such bond. This may be done before the institution of any criminal proceedings, before such delinquent is convicted and entirely independent of the provisions of” sections 34 or 36 of said act. (*Lyman v. Rochester Title Ins. Co.*, 37 App. Div. 239.)

The penalty of the bond given by defendant Coyle with the defendant the Fidelity and Deposit Company, as surety was \$700.

The provision of the statute and the bond is that in case the condition is broken the penalty may be recovered of the surety.

Judgment is hereby directed to be entered in favor of the plaintiff and against the defendants for \$700 and costs.

Supreme Court, Dutchess County, May, 1899. Unreported.

HENRY H. LYMAN *v.* EDWARD PERLMUTTER and FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

PHILLIPS, Referee:

The defendant Perlmutter in the summer of 1897 conducted a hotel at Upton Lake, in the town of Stanford, Dutchess county, New York, the defendant the Fidelity and Deposit Company of Maryland is the surety upon the bond given by him on making his application for the liquor tax certificate which was issued to him.

This action is brought to recover the amount named as the penalty of the bond, under the statute, upon the allegation that the defendant Perlmutter has violated the condition of the bond

in that he has at certain times named in the complaint sold lager beer on Sunday contrary to the provisions of the liquor tax law.

The testimony is that on the second Sunday in August, 1897, the defendant Perlmutter sold lager beer, upon the licensed premises to one Hart, one Masten and one Brundage, which beer was then drunk by all of them. There was some evidence introduced tending to substantiate a claim that this beer was furnished with a sandwich or meal, but it was of such character and so contradicted by the persons who purchased the beer that in my judgment it is entitled to no credit.

The testimony of the witness, Mrs. Millis, is positive that she saw the defendant Perlmutter sell lager beer at his place on Sunday morning, that is, after twelve o'clock Saturday night. She is in her testimony somewhat confused as to dates but in my opinion her testimony bears the stamp of truth. An attempt is made to break the force of her testimony by discrediting her, but it seems incredible that she, well known, as she testifies, as an advocate of temperance for years should stop at the house of the witness Near and there, without any preliminaries call for and with him drink beer, the testimony of Near is unworthy of credit.

The cause of action is made out, one sale contrary to law would be a breach of the condition of the bond. If the condition of the bond is violated this authorizes an action to recover the penalty of the bond, in this case \$500. (*Lyman v. Rochester Title Ins. Co.*, 37 App. Div. 239.)

Judgment for plaintiff against defendants Edward Perlmutter and the Fidelity & Deposit Company of Maryland for \$500 and costs.

Supreme Court, Livingston County, April, 1899. Unreported.

In the Matter of the Application of JOSIAH V. LOCKLIN for a Restraining Order against MICHAEL J. LEE.

To the Supreme Court:

I, William A. Sutherland, the referee appointed in this proceeding by order of this court made January 31st, 1899, to take and report the evidence, together with my opinion, do hereby certify and report that from the evidence taken before me I am of opinion that the following facts are established:

The defendant occupies a building in the village of Caledonia and holds a liquor tax certificate such as is granted to hotel keepers. On the 26th day of November, 1898, the defendant's premises were visited by two inspectors of the excise department named Bradley and Parsons, on which date the defendant had three sleeping rooms on the first floor and three on the second floor of his hotel. The first of the rooms down stairs was a dark room, that is to say, a building had been erected commencing in November, 1897, and finished in February, 1898, (page 50), so close to the Lee hotel that it absolutely darkened and prevented the ingress of light through the only window which had formerly lighted this room. The second of these rooms on the first floor was in the extreme rear of the building and could be entered from the interior of the building only by passing through the room first above described, there being no independent doorway or means of access into the hallway. In the rear of the room there was a sash door opening into the back yard, through which door this room receives its light. The third bedroom below complied with the requirements of the statute. One of the three rooms on the second floor had no doorway opening into the hall, the only means of access thereto from the hall being through one of the other two bed rooms on that floor.

The hotel premises of the defendant were in the condition above described from November 26, 1898, up to and including February 17, 1899, the date of the first hearing in this proceeding.

Between February 17, 1899, and March 11, 1899, the date of the second hearing, an attempt was made to erect an additional bed room on the first floor immediately in the rear of the barroom and in front of the bedroom first above described. On this latter date a map of the defendant's premises was received in evidence on which the room now referred to is marked number one. The room described first in the testimony of February 17th, is marked number two, and the other two rooms below marked respectively three and four, the three rooms on the floor above being marked respectively five, six and seven. The room number one of March 11th, 1899, is a part of the area of the hallway back of the barroom. It is marked "dark" upon the map because the light from the window in the hallway is considerably obscured by a large cooler which extends five feet four inches across the face of this room, leaving an open space two feet eight inches wide, through which passage is had from the main hallway into this room, the

passage being open and without any door or other means of closing it up. This room was separated from the barroom by a partial partition reaching eight feet towards, but not connecting with, the ceiling.

Between the date of the hearing on March 11th and March 27th, the date of the third hearing, (page 68), still further changes were made on both floors of the hotel. On the first floor the hallway had been shifted to the other side of the building, and the two rooms marked one and two on the map of March 11th, are now occupied in part by the hallway, whereas what was the hallway now constitutes a part of two bedrooms. Each of these newly constructed bedrooms contains an independent doorway opening into the hall, each of them is lighted by a proper window, and the bedroom in the rear of this, which formerly had no doorway, is now supplied with such a door.

On and after March 27th, 1899, the defendant Lee, had four rooms on the first floor of the hotel properly equipped as bedrooms, each complying with the structural requirements of the statute. On the second floor, the three bed rooms remain the same as before, except that the bed room next to the dining room, number five on the map of March 27th, now has a doorway opening into the hall, the same room, number seven on the map of March 11th, not having been previously provided with any door into the hall. Each of these rooms now complies structurally with the requirements of the statute.

The defendant Lee was advised by three excise agents visiting his place officially on different dates that his hotel very nearly complied with the statutory requirements. He was advised by the agent Robertson (page 60) that his hotel substantially conformed to the requirements of the statute. This witness, who is a lawyer by profession, and had been district attorney of his county, testified March 11th, 1899, (page 61), that in his opinion the rooms in the defendant's hotel as then constructed were in conformity to the statute.

The defendant Lee, his wife and one child have lived at the said hotel during the period covered by his said license and are accustomed to occupy one of the said bed rooms for sleeping accommodations (testimony of Thompson, page 31; testimony of Howke, page 50; testimony of John Lee, page 58).

From about the 10th day of September, 1898, until about the last day of October, 1898, the defendant suffered and permitted a

gambling device known as the nickel-in-the-slot machine to be set up in one of the main rooms, or office, of his said hotel, during which time the said nickel-in-the-slot machine was used and operated by those who chose to do so to a greater or less extent. When the said machine was set up the defendant was informed by an agent of the manufacturer thereof that it had been decided by a court of competent jurisdiction that the said machine, or device, was not a gambling apparatus, and a clipping from a Rochester newspaper was exhibited to the defendant in support of this claim. Subsequently, and at about the time the said machine was taken away from the said hotel the defendant was informed and advised that the said machine was a gambling device and had not been declared or decided otherwise by any court of competent jurisdiction, and the defendant thereupon, or very soon thereafter, caused the said machine to be removed from his said hotel and returned to the vendor, or former owner, and the same has not been in use in his said hotel since the date last above mentioned.

On the 30th day of September, 1898, the defendant attended bar at his said hotel and on that day sold beer (pages 69 and 70) to Roy McWilliam, who was sixteen years of age on the first day of May, 1898. The beer was paid for by McWilliam. Edward Johnson, who was seventeen years of age in July, 1898, was present with McWilliam on the 30th day of September, 1898, and the defendant Lee delivered beer to Johnson, the same time that he supplied McWilliam, and McWilliam paid for the beer furnished to both. The boy Johnson became intoxicated on this occasion (page 77) having had several drinks at the defendant's place.

The foregoing are all of the facts which I deem established by the testimony offered before me and, in addition to the allegations of the moving papers which are admitted in the answering affidavits, constitute all the facts proved in this matter.

The jurisdiction and authority of the referee being limited to the powers conferred upon him by the order of his appointment and by the terms of the statute under which the appointment is authorized has no power to pass on questions of evidence and can only note the objections and exceptions of the parties, must take the evidence offered by either party, the competency of the testimony to be determined by the court on the coming in of the report. (*Fox v. Moyer*, 54 N. Y. 125; *Ward v. Ward*, 29 Abbott's New Cases, 256; *Matter of Crooks*, 23 Hun, 696; *Sullivan v. Sullivan*,

52 Howard, 453; *Dormus v. Doremus*, 76 Hun, 337, 59 State Rep. 324.)

I have therefore taken all the evidence offered by either party on this proceeding, noting the objections in each instance together with a ruling and an exception, and in some instances, upon the request of counsel, noting also my own opinion as to the ultimate admissibility of the testimony.

For reasons more fully expressed in the Woollett case I am of opinion that the petitioners are not entitled to the injunction sought in this proceeding. All the acts complained of at the time of the commencement of these proceedings have ceased.

Judge Grey said in *Reynolds v. Everett*, 144 N. Y. 189, 194: "The refusal to grant the relief prayed for (an injunction) could rest upon the general view taken of the merits of the case, or it could rest upon the cessation of the acts complained of." Reynolds sought an injunction against certain cigarmakers in Binghamton on account of a strike in which they were engaged at the time of the commencement of his action. Judge Grey says, (page 194): "The finding of the trial justice was, and it appeared upon the trial as an incontroverted fact, that the so-called strike began on a certain day and was then over and there no longer existed that condition of things in which the complainants had sought the aid of a court of equity."

So it is here. All complaint as to the structural character of the defendant's premises ceased, according to the proofs, on or before March 27th, 1899. The nickel-in-the-slot machine was removed from his premises before the commencement of these proceedings and there is no proof that he has sold beer to any persons under the age of eighteen years except on the 30th day of September, 1898. I am of opinion that the defendant did not have six statutory guest rooms in his hotel prior to March 11th, 1899, nor prior to some time between March 11th, 1899, and March 27th, 1899. The proofs as to his hotel made on the 11th day of March, 1899, showed seven bed-rooms of which four were on the first floor, room number one being absolutely dark, having no means for receiving the daylight except through a hallway, two feet eight inches wide opening into a larger hallway. There was no window anywhere in this room number one. Room number two originally had a window but that window was walled up by the erection of an adjacent building previous to the granting of the license under consideration. True, there was a transom

over the doorway by which this bedroom was entered from the dark room number one, but this transom did not admit light and room number two was properly designated as a dark room upon the map filed March 11th. Room number three while properly lighted did not have "independent access by a door opening into a hallway." It had two doors, one opening into the bed-room number two and one opening into the back yard.

It is argued that this rear door was in substantial compliance with the statute and that room number three being so situated that a person could get out of it without passing through any other bed-room must be deemed to have complied with the statute.

I cannot so interpret the statute. The defendant seeks the aid of a statute to enter a privileged class. Desiring to engage in an occupation from which all are excluded save those who will comply with the statute he must be held to a reasonably exact compliance with the conditions which the statute imposes. While the Legislature might have said that doorways from bed-rooms opening into the back yard would be acceptable and rooms thus furnished might be counted as guest rooms, yet the Legislature thought it wise to specifically direct that there must be an independent doorway from each guest room opening into the hallway of the hotel; and he who seeks the privileges conferred by this statute cannot be permitted to disregard a positive, unmistakable, unequivocal command of the statute and justify himself by the plea that he has done something else which he thinks is equally as good.

On the second floor by the testimony of March 11th, room number seven concededly had no doorway opening into any hallway but had two doors, one opening into bedroom number six and the other opening into the dining-room. It is clear to my mind that on and prior to March 11th, 1899, there was but one bedroom on the first floor and there were but two bedrooms on the second floor which complied with the requirements of the statute.

I have been thus precise and definite in pointing out the radical defects in the bedrooms both in this case and in the Woollett case because the defendants in both cases were advised by those whose advice they had a right to regard as well nigh authoritative, that the plain and simple directions of the statute might be disregarded, that their bedrooms as equipped before the hearing on March 27th were in substantial conformity to the statute and were satisfactory to the excise department of the State.

While therefore this defendant may be excusable in large measure for failing to comply literally with the statute I am of opinion that the advice given him by the agents of the excise department was erroneous to say the very least, and ought not to be countenanced nor apparently sanctioned when brought under review by the court. While therefore I am of opinion that the present condition of the defendant's premises must lead to a denial of an injunction, and this proceeding having been instituted only for an injunction must necessarily be dismissed, yet in order that such dismissal may not be regarded as in any wise sanctioning the acts which were complained of by the petitioners, I have felt constrained to point out the various particulars in which, in my judgment, the defendant failed to comply with the statute up to and including March 11th, 1899.

The application for the writ of injunction should, however, be denied.

M. A. SUTHERLAND,

Referec.

Dated at Rochester, N. Y., this 21st day of April, 1899.

Supreme Court, Livingston County, April, 1899. Unreported.

In the Matter of the Petition of JOSIAH V. LOCKLIN for a Restraining Order against FRED D. WOOLLETT.

To the Supreme Court:

I, William A. Sutherland, the referee appointed by the order of this court made January 31st, 1899, to take and report the evidence to the court, together with my opinion, do hereby certify and report that from the evidence taken before me I am of opinion that the following facts are established:

The defendant occupies a building in the village of Caledonia and holds a liquor tax certificate such as is granted to hotel-keepers. That on the 26th day of November, 1898, the defendant's premises were visited by two inspectors of the excise department named Bradley and Parsons, on which date the defendant had two bed rooms on the first floor of his hotel, and four bedrooms in the second story. These inspectors (pages 8 and 17) found

only six bed rooms in the house, including the upper front room as one of them, and were informed by the defendant that he and his wife had accommodations outside of the hotel. Of these four upper rooms one was the front room, which doubtless at one time had constituted a parlor or sitting room. Immediately in the rear of this front room (page 6) was one of the six bedrooms which had no window, but which received its light from the windows in the front room through an aperture or doorway between the two rooms (page 7). In the rear of this windowless room was another bed room, and in the rear of that still another, each of which was lighted only by skylights (page 1). In every other particular than the matter of lights the three bedrooms last above described complied with the statute, that is to say, each of them had independent access to the hallway and each of them contained the necessary cubic feet space and square feet area.

The hotel premises of the defendant were in the condition above described from November 26, 1898, up to and including February 17, 1899, the date of the first hearing in this proceeding.

Between February 17, 1899, and the date of the second hearing March 11th, 1899, changes were made in the interior of the hotel as follows: The front room in the second story had been divided into two rooms by the erection of a partition running north and south and easterly of the doorway opening into the dark room (page 26). At this date, March 11th, this dark room marked number four on the map (exhibit 1) had no window, but had a door opening into the hallway.

Between the date of the hearing on March 11th and the date of the third hearing, March 27th, (page 83), still further changes were made in the second story of the defendant's hotel as shown by a map (defendant's exhibit two, March 27, 1899), as follows: A hallway has been extended along the face of what was the original front room, or parlor or sitting room, so that on the said date of March 27th, there was an independent doorway from both front rooms opening into this hallway as well as an independent doorway from the original dark room opening into the hallway, and (page 99) a window has been inserted over the door leading from the original dark room into the hallway, which window complies with the statutory requirements as to dimensions. On the said 27th day of March, 1899, the defendant's hotel was equipped with seven bedrooms, two on the first floor and five on the second floor. Rooms number three and four shown on the map last

produced are still lighted by skylights. That the defendant Woollett was advised by three excise agents visiting his place officially on different dates that his hotel very nearly complied to the statutory requirements, was directed by them to make certain structural changes, with which directions he complied. That the defendant Woollett had endeavored to comply with the directions given him from time to time by the special agents of the excise department, and has endeavored to make his hotel conform structurally to the requirements of the statute as the statute was interpreted to him by these excise agents. That the defendant Woollett and his wife have lived at the said hotel during the period covered by his said license and are accustomed to occupy one of the said bedrooms for sleeping accommodations.

That from about the first day of August, 1898, until about the last day of October, 1898, the defendant suffered and permitted a gambling device known as a nickel-in-the-slot machine to be set up in one of the main rooms, or office, of his said hotel, during which time the said nickel-in-the-slot machine was used and operated by those who chose to do so to a greater or less extent.

That when the machine was set up in the defendant's hotel the defendant was informed and advised that the machine was not a gambling device and had been so declared by a court of competent jurisdiction. That subsequently, and at about the time the said machine was taken away from the said hotel the defendant was informed and advised that the said machine was a gambling device and had not been pronounced otherwise by any court of competent jurisdiction, and the defendant did thereupon, or very soon thereafter, cause the said machine to be removed from his said hotel and returned to its vendor, or former owner, and the same has not been in use in his said hotel since the date last above mentioned.

The foregoing are all of the facts which I deem established by the testimony offered before me, and, in addition to the allegations of the moving papers which are admitted in the answering affidavits, constitute all the facts proved in this matter.

Several legal questions have been argued before me with great earnestness, upon which my opinion and the decision of the court thereon will only be useful in serving as a guide in the future to the defendant and others interested in these questions.

Two remedies were open to the petitioners in this case on

account of any infringement of the Raines Law. By application to the court under one section of that law proceedings might be instituted for a revocation of the license issued to the defendant. Under another section of the same act these proceedings were instituted, not for a revocation of the license, but for an injunction to restrain the defendant from trafficking in liquors in an unlawful manner.

An injunction is of course a preventive remedy. It relates to the future rather than to the past. It was stated by Judge Danforth in *Peck v. Goodberlett*, 109 N. Y. 180, 189: "He invoked equitable relief, and demanded a preventive remedy as the only one sufficient to rectify the evils of which he complained, and thus became subject to the practice of courts of equity, where such relief only is administered, as the nature of the case and the facts as they exist at the close of the litigation demanded."

In the *Peck* case the plaintiff had sought an injunction to restrain the defendant from emptying unusual quantities of water upon plaintiff's farm, by means of a ditch, dug by the defendant, which changed the ordinary course of the water. Soon after the commencement of the action the defendant closed up that particular ditch and the court denied the plaintiff the injunction which he asked and dismissed his suit, with costs, pointing out that if the plaintiff had sued for damages he might have obtained judgment for the damages which had accrued up to the time of bringing his action, but, as he had asked for preventive rather than compensatory relief, and as the situation at the time of the trial showed that no need of an injunction existed, the injunction would be denied and the complaint dismissed.

So in this case, the interior arrangements of the defendant's hotel have been materially changed since the commencement of these proceedings, and I am of opinion that at the date of the last hearing the defendant's hotel was shown to be structurally in conformity with the requirements of the law.

I cannot agree to the contention that the hotel had complied structurally with the requirements of the statute previous to the changes last made notwithstanding the insistent and vehement opinion and advice of the special agents of the Excise Department.

The statute says, section 31, subdivision 2, that there must be independent access to each room by a door opening into a "hallway" and that each room must have "a window, or windows,

with not less than eight square feet of surface opening upon a street, or open court, light shaft or open air." The so-called dark room on the second floor of the Woollett house, being room number four on the map, exhibit one, March 11, and being number five on the map, exhibit two, March 27th, did not until the change shown by map (exhibit two) have any window or windows whatsoever, but there was a doorway between the said room and the front room through which doorway light could enter this otherwise dark room. So the change testified to by the witness as taking place between the date of the first hearing and the hearing on March 11th, 1899, whereby the upper front room was cut into two rooms by the building of a partition, did not render the new room number seven on the west end of the front of the second story obedient to the statute. There was on the 11th day of March, 1899, no doorway opening from this room number seven into any hallway and there was no independent access to this room number seven "by a door opening into a hallway." The door from room number seven opened only into this dark room number four and one had to pass through that room in order to reach the hallway.

One of the excise agents who had visited the defendant's hotel was a lawyer and had been district attorney of his county. It is therefore easy to see how the defendant could be induced to rely upon his advice, and he advised the defendant that the rooms thus arranged conformed with the statute, but it seems to me that when a statute says a room must have independent access by a door opening into a hallway the courts cannot count as one of the six bedrooms required by the statute a room from which a guest cannot reach the hallway save through a door which opens into another bedroom likely to be occupied by another guest.

The defendant and his counsel seem to lean towards this view of the statute for notwithstanding the advice so emphatically given by the three agents of the excise department between the hearing on the 11th day of March, 1899, and the hearing March 27, 1899, the defendant has concluded to extend a hallway between these two rooms so that now there is a doorway opening directly from room number seven into the hallway. So, too, although no window had been provided for the dark room in the rear of number seven until subsequent to the hearing on March 11th, yet it was conceded in connection with the production of the map on March 27th, 1899, that over the doorway leading into the hallway from this dark room had been built a

window conforming to the statutory requirements as to dimensions.

On the other hand, I do not agree to the contention that the skylights are not sufficient windows for two of the rooms on the upper floor.

The statute says that each bedroom must have "a window * * * opening upon a street, or open court, light shaft or open air."

It is urged by the petitioners that a window can only be a window if it is located in the side of a building and yet the statute contemplates some kind of an opening for the admission of light by means of a "light shaft" and the statute would be satisfied if a window should open into such a light shaft. The two rooms in question are supplied with light through skylights. There is but one definition of the word skylight given in Webster's dictionary which is as follows: "A *window* placed in the roof of a building, in the ceiling of a room or in the deck of a ship, for the admission of light from above." It seems to me that every purpose of the statute is fulfilled whether the quantity of light deemed desirable for a bedroom enters that room through the ceiling of the room or through the side of the room, and certainly the Legislature has said that if the light enters through a window opening upon an air shaft the requirements of the statute are fulfilled.

Whatever fault could have been found with the defendant's premises prior to the hearing of March 27th it appeared that on that day his hotel was furnished with seven sleeping rooms each fully complying with every requirement of the statute. The defendant therefore had on that date, and presumably intends to maintain six fully equipped bedrooms for the accommodation of guests in addition to the one occupied by himself and wife.

Whatever consequence might have followed had some other remedy been invoked than an injunction it seems to me clear that an injunction is not within reach of the petitioners whose only effect would be to prohibit the defendant from going to the expense of restoring his rooms to the conditions they were in prior to March 27th. In other words, all occasion for complaint against the character of the defendant's hotel having now vanished an injunction will not issue to prohibit the defendant from doing what he has ceased to do and what it is evident he does not intend to do. These views apply not only to the complaint as to

the structural conditions of the rooms but also as to the use of the gambling device known as the nickel-in-the-slot machine. Whatever penalties might have been visited upon the defendant for permitting this machine to be operated during the few weeks it was in his hotel, he having voluntarily removed it and discontinued its use before the commencement of this proceeding an injunction will not issue to prohibit him from continuing its use. I am of the opinion that the proceedings against the defendant Woollett should be dismissed.

Rochester, N. Y., April 21, 1899.

W. A. SUTHERLAND,
Referee.

County Court, Monroe County, April, 1899. Reported. 27 Misc. 308.

THE PEOPLE ex rel. JOHN LEONARD, Relator, *v.* JOHN B. HAMILTON
as County Treasurer of Monroe County.

1. Liquor Tax Law (Laws of 1896, chap. 112, sec. 19)—The evidence of the result of a vote on local option which should be furnished to a county treasurer in order to justify him in refusing to issue a liquor tax certificate.

An original memorandum or declaration of a town clerk as to the result of a town election in regard to local option, merely stating the vote on each of the four propositions submitted to a town meeting, is not "a certified copy of the statement of the result" sufficient, within the meaning of section 19 of chapter 112 of the Laws of 1896, when filed by the clerk with the county treasurer to justify the latter in refusing to grant a liquor tax certificate to a hotel keeper of the town, which had voted at said town meeting against the sale of liquor for the ensuing two years.

The statement which should be filed with the county treasurer is a copy of the formal return of the result of the canvass of the votes, signed by the four justices who presided at the town meeting, a copy of their certificate that "the foregoing statement is correct," and to such copies the town clerk should add his certificate that the papers are true copies of the originals on file in his office.

2. Same—Error of town clerk not allowed to defeat the result of an election as to local option.

The error of the town clerk will not be allowed to defeat the wishes of the people as expressed by the election, and, instead of directing a liquor tax certificate to issue at once, the court will allow five days for the filing by the town clerk with the county treasurer of a proper certified statement of the result of the election.

PROCEEDINGS upon a writ of *certiorari* granted by the county judge of Monroe county to review the action of John B. Hamilton, as county treasurer, in refusing to issue a liquor tax certificate to the relator.

George D. Forsyth, for relator.

P. W. Cullinan, for county treasurer.

SUTHERLAND, J. The relator is the proprietor of the "Cottage Hotel" in the village of Spencerport, town of Ogden, and holds a liquor tax certificate expiring April 30, 1899, which authorizes him to sell liquor as a hotelkeeper in said town. On March 24th he made an application in due form to the county treasurer for a new certificate to enable him to continue to sell during the year commencing May 1st. With his application he tendered a bond executed in proper form for approval and offered to pay the amount of the tax, but the treasurer declined to issue the certificate upon the ground that March 14, 1899, the town clerk of said town filed with him a paper of which the following is a copy: "County of Monroe. - Statement of the vote of the town of Ogden on questions submitted on local option at the annual town meeting held in said town March 7, 1899:

" Question No. 1: number voting Yes, 250; No, 328.

" Question No. 2: number voting Yes, 218; No, 314

" Question No. 3: number voting Yes, 351; No, 185.

" Question No. 4: number voting Yes, 260; No, 305.

" F. H. DEWEY,

" Town Clerk."

In response to the writ, the treasurer answers that said instrument was considered by him as due official information that the electors of the town of Ogden had determined by a vote taken at their town meeting under the local option provisions of the Liquor Tax Law that no liquors should be sold in that town during the next two years (except by a pharmacist and upon a physician's prescription), and that accordingly he could not lawfully issue the certificate applied for by the relator.

The relator now attacks the document filed by the town clerk as not authoritative, and as insufficient upon its face to warrant the refusal of his application, and counsel agree that the lega:

sufficiency of the clerk's statement is the only question to be determined by me in this proceeding.

Under the Liquor Tax Law of 1896, local excise boards are abolished, and the people of the towns are permitted, for the first time since 1847, to vote directly upon the question of sale or no sale in their respective localities. The county treasurer has no discretion to exercise in granting or refusing liquor tax certificates. He acts ministerially and is governed by the face of the papers filed with him. People ex rel. Belden Club v. Hilliard, 28 App. Div. 140. In towns where the sale of liquor is lawful, the right of any duly qualified applicant to enter upon or continue the business remains until, under the local option clause, the right is lost by vote of the people. There is no presumption that such a vote will be taken at the biennial town meeting. In order to have a vote, some one must take the initiative, and the conditions precedent must be complied with, and accordingly section 19 of the Liquor Tax Law provides that when a proper application statement is made with the requisite consents, and a sufficient bond furnished, "the county treasurer * * * shall at once prepare and issue to the * * * person making such application and filing such bond and paying such tax, a liquor tax certificate in the form provided for in this act, *unless it shall appear by a certified copy of the statement of the result of an election held on the question of local option, pursuant to section sixteen of this act, in and for the town where the applicant proposes to traffic in liquors under the certificate applied for, that such liquor tax certificate can not be lawfully granted, in which case the application shall be refused.*"

Under section 16, which regulates the procedure for voting upon local option, provision is made for submitting to the people four distinct questions, and the section provides that "*A certified copy of the statement of the result of the vote*, upon each of such questions submitted, shall, immediately after such submission thereof be filed by the town clerk or other officer with whom returns of town meetings are required to be filed by the election law, with the county treasurer of the county." The word "certified" was inserted in section 16 before "copy" by the amendment of 1897.

Now, the document filed by the town clerk with the treasurer, March 14th, is not the "certified copy of the statement of the result of the vote" which the clerk is required to file by section 16, and with which, under section 19, the treasurer must be fur-

nished in order to refuse an applicant his certificate. The use of the definite article "the" before the words "statement of the result of the vote" gives to those words precise and definite application. The words undoubtedly refer to that formal return of the result of the canvass of the votes, which, under sections 83, 84 and 111 of the General Election Law, must be made and signed by the inspectors of election. This formal document is styled throughout the Election Law as "The Original Official Statement of the Result" and "The Original Statement of the Canvass." By section 110 it is made a felony for any election officer to sign "any original statement of canvass" at any place other than the polling place. Very careful provisions are made for the preservation of the ballots marked for identification and of ballots rejected as void, which are to be secured in sealed packages and filed "with the original statement of the canvass"; and section 111 of the Election Law further provides: "If ballots are voted on any constitutional amendment, proposition or question, a similar return of the ballots and votes cast thereon shall be made and included as a part of such original statement. * * * At the end of each return contained in such original statement of the canvass, and also at the bottom of each sheet, or half-sheet thereof, the inspectors shall make and sign a certificate that the foregoing statement is correct."

That these general provisions of the Election Law apply to town meetings can not be doubted. In the original enactment of the Election Law, chapter 680, Laws of 1892, section 117, there was a direction that in town elections held at a different time from a general election, a certified copy of "the statement of the result of the canvass" should be filed with the town clerk. In the re-enactment of the Election Law, in 1896, section 117 was omitted, its substance being incorporated into other sections. The requirement that a certified copy of the original statement should be filed with the town clerk seems to have been omitted in the revision, possibly because the original statement itself is filed with the town clerk as the proper custodian of the records of the town meeting.

In the town of Ogden the town meeting is not held in separate election districts, and, accordingly, the four justices of the peace of the town preside at the town meeting and discharge the duties of inspectors of election. In the general revision of the statutes adopted by the Legislature in 1827, it was provided that the

justices of the town should preside at town meetings and act as inspectors of election, canvassing the vote (1 R. S. chap. 11, tits. 2, 3), and the town clerk had no voice in judging as to the result; he only recorded the proceedings of the meeting which had to be signed also by the justices presiding. These provisions have remained substantially unchanged to the present day, except where a town holds its town meeting in separate election districts. The four justices were called the canvassers (chap. 289, Laws of 1830), and are so referred to in the present Town Law. § 39. The clerk is not made a member of the canvassing board. The statement of the result of the canvass, under the Election Law, must be signed by the four justices, they certifying at the end that "the foregoing statement is correct," and then the statement is filed with the town clerk as a permanent record. The town clerk should have copied this original return of the canvass of the votes upon the four propositions submitted, copying also the certificate as to the correctness of the statement, and the signatures of the justices thereto, and to this copy the clerk should have added his own certificate to the effect that it was a true copy of the original statement on file in his office, and filed this certified copy with the county treasurer.

I do not think it can be fairly said that the paper actually filed with the treasurer by the town clerk is a substantial compliance with the statute. It is, upon its face, an original memorandum or declaration by the clerk upon his own authority as to the result of the election. It does not purport to be a copy of any original official record. It would not be competent as evidence, in its present form, in any judicial proceedings. The proper statement of the result acquires authenticity from the certificate of the justices of the peace, who are the exclusive judges of the election. Their determination, evidenced by their certificate and signatures, is of higher value as evidence than the independent written assertion of the town clerk, and of this higher form of proof, authenticated in due form, the Legislature says the treasurer must be possessed, in order to warrant him in refusing an applicant for a certificate.

My duty in the premises is marked out by section 28, subdivision 1: "If such judge or justice shall upon the hearing determine that such application for a liquor tax certificate * * * has been denied by such officer without good and valid reasons therefor, and that under the provisions of this act such liquor tax

certificate should be issued or transferred, such judge or justice may make an order commanding such officer to grant such application." As the case now stands, under the strict terms of the statute, a peremptory order might be made directing the immediate issuance by the treasurer to this relator of a liquor tax certificate; but, if the question of the sale or no sale has been rightfully submitted to the electors of the town of Ogden and a majority of the people have declared their will to be that no intoxicants shall be sold as a beverage in their town during the next two years, and the result of that vote has been properly ascertained, and a due certification thereof filed with the town clerk, it still remains the duty of that officer to file with the county treasurer "a certified copy of the statement of the result of the vote." And I believe it to be my plain duty not to make an order for an immediate issuance of a certificate to the relator, but to postpone the date for the issuance of the certificate for a sufficient length of time for the town clerk to correct any error in the form of the paper filed by him, in order that the will of the people may be respected and the rights of the electors upheld. It is a sound and wholesome principle often enunciated that where an election is regularly and lawfully held, the courts will not, by a narrow and technical construction of the election laws, permit the election itself to be defeated by the mistake or omission of a clerk or other ministerial officer in a matter of detail, which does not mislead the public nor affect the result. *People ex rel. Hirsh v. Wood*, 148 N. Y. 146.

The validity and regularity of the election itself is not before me for review. If a vote was properly taken under the local option clause, then the subsequent mistake of the town clerk, which, in this instance appears to have been innocently made, should not occasion a peremptory and unconditional order without an opportunity to have the clerical error rectified. To hold otherwise would be to subordinate substance to form and place the servant above his master. These statutes are calculated to ascertain and give effect to the popular will, not to thwart it.

In his petition for this writ the relator asserts that because of certain irregularities in the preliminary procedure, the election itself on the local option matter was illegal and void. It is conceded that I have no jurisdiction in this proceeding to pass upon that question, but counsel for the relator state their intention to

attack the legality of the vote in any proceeding that may hereafter arise wherein that question can be judicially determined, and it was suggested upon the argument that if an order were made by me, directing the treasurer to issue immediately to the relator a liquor tax certificate, a correctly attested and certified copy of the statement of the result of the vote might then be filed by the town clerk with the county treasurer, and a proceeding taken by any one interested under subdivision 2 of section 28 for the revocation of the certificate issued pursuant to my order, in which second proceeding the legality of the election itself might be tested. This, however, might cast the burden of instituting a contest upon innocent parties. If an election has been fairly and regularly had, the people of the town of Ogden should not be compelled to take the initiative to protect their rights, and the burden should be assumed by him who asserts the invalidity of the vote. I cannot assume, for the purposes of deciding this case, that the election was invalid.

The order to be entered may provide that the county treasurer shall issue a liquor tax certificate to the relator, pursuant to the application made by him on the payment of the tax, unless, within five days, the town clerk of the town of Ogden shall file with the county treasurer a certified copy of the statement of the result of an election held on the question of local option, at the March town meeting, from which it shall appear that such liquor tax certificate cannot be lawfully granted, in which case the application shall be refused. This order works no injustice to the relator. If a legal election has not been held the learned counsel who are protecting the rights of the relator will doubtless find means to prevent the filing of a certificate of an illegal election, or will advise some other method by which full redress can be accorded to the relator for any wrong suffered by him. No costs are allowed in this proceeding.

Ordered accordingly.

First Appellate Department, April, 1899. Reported. 39 App. Div. 459.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, *v.* SHENANDOAH SOCIAL CLUB, Defendant, Impleaded with FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant.

Surety—Liability of, upon a bond given under section 18 of the Liquor Tax Law—An action upon such a bond is a civil action.

The liability of a surety upon a bond given in pursuance of section 18 of the Liquor Tax Law (Chap. 112, Laws of 1896, as amd. by chap. 312 of the Laws of 1897) is not limited to the civil or criminal penalties prescribed in that act for the violation of its provisions. Upon proof that the premises were disorderly and that liquor was sold thereon on Sunday and between one and five a. m. on other days, in violation of the conditions of the instrument, the surety becomes obligated to pay as liquidated damages the penal sum mentioned in the bond, independently of the fact that a judgment for a like amount may have been recovered against the principal in an action for the civil penalties.

An action upon such a bond is not criminal either in form or substance, but is a civil action upon a contract.

APPEAL by the defendant, the Fidelity and Deposit Company of Maryland, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 27th day of October, 1898, upon the verdict of a jury rendered by direction of the court.

The action is upon an excise bond given by a corporation known as the Shenandoah Social Club as principal, and this appellant as surety, to the People of the State of New York.

The bond is in the penal sum of \$1,600, conditioned as follows:

"WHEREAS, the above bounden principal is about to apply for a liquor tax certificate in the sum of eight hundred dollars, for excise tax on the business of trafficking in liquors at 502 and 504 Sixth avenue, in the city of New York, county of New York, State of New York, under subdivision one of section 11 of the Liquor Tax Law of the State of New York. Now the condition of the obligation is such that if the said tax certificate applied for, as aforesaid, is given unto the said principal, and the said principal will not, while the business for which such tax certificate is given shall be carried on, suffer or permit any gambling to be done in the place designated by the tax certificate in which the traffic in

liquors is to be carried on, or in any yard, booth or garden appertaining thereto, or connected therewith, or suffer or permit said premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law, or any act amendatory thereof or supplementary thereto; then this obligation shall be void, otherwise it is to be and remain in full force and effect to cover every violation of the Liquor Tax Law and all fines and penalties incurred or imposed thereunder. An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for violation of any provision of said Liquor Tax Law."

This bond was given after the amendments to the Liquor Tax Law enacted in 1897 (Chap. 312) had gone into effect. It is consequently governed by the Liquor Tax Law of 1896 (Chap. 112) as thus amended. Upon the trial the plaintiff proved by undisputed and unimpeached testimony that the principal in the bond permitted the premises therein specified to become disorderly. He also proved by equally undisputed and unimpeached testimony violations of the Liquor Tax Law in that such principal sold or allowed liquors to be sold in said premises on Sunday and between the hours of one and five A. M. on other days. The defendant surety offered no testimony, but contented itself with a motion to dismiss the complaint upon the ground—we quote from the record—"that it is in form an action on a contract and not an action for statutory penalties, and that no judgment can be rendered against the defendant, the Fidelity Surety Co., as the amount of the statutory penalties cannot be fixed in this action." This motion was denied and the defendant excepted. The defendant surety company then asked to go to the jury upon the following questions: *First*. Upon the question whether on the evidence in this case there was any breach of the condition of the bond by the Shenandoah Social Club. *Second*. What breaches, if any, of the conditions of the bond by the Shenandoah Social Club the evidence proves to have been committed—that the jury may determine the question of fact with respect to such breaches, if any. *Third*. As to the amount of the penalties, if any, which should be imposed upon the Shenandoah Social Club in consequence of the alleged violations of the Liquor Tax Law, which the plaintiff claims to have proved in this action. *Fourth*. To determine what amount the plaintiff should recover against the defendant, the surety company

in this action, and that such amount, within the limit of the penalty of the bond, should be such a sum as in the opinion of the jury would fairly represent the proper penalty so found to be imposed upon the Shenandoah Social Club for the violation of the Liquor Tax Law claimed by the plaintiff to have been proved in this case, provided the jury find that such violation took place.

The court declined to submit all or any of these questions to the jury, to which declination the defendant excepted. The court thereupon directed a verdict for the plaintiff for the full amount of the penalty of the bond, \$1,600, to which direction the defendant excepted.

James R. Soley, for the appellant.

Royal R. Scott, for the respondent.

BARRETT, J. The main question presented by this appeal is whether the appellant's liability upon the bond is in the nature of a penalty or of liquidated damages. The bond was given in accordance with the provisions of section 18 of the Liquor Tax Law. (Laws of 1896, chap. 112 as amd. by Laws of 1897, chap. 312, § 11.) Its purpose was to secure, on the part of the principal, not only observance of the Liquor Tax Law and its special mandates, but also good behavior in other particulars essential to the orderly and proper conduct of the business. Thus we find, as one of the conditions of the bond, that the principal will not suffer or permit any gambling to be done in the place where liquor is to be sold, or suffer or permit the premises to become disorderly. These conditions precede and are additional to the general condition that the principal will not violate any of the provisions of the law itself. Gambling in the premises is not of itself a violation of the Liquor Tax Law. Nor is every form of gambling necessarily a violation even of the Penal Code upon the subject of "Gambling." Section 343 of that Code is aimed at the keeping of a room, etc., to be used for gambling, also at the letting of a room for such use by the owner or his agent, or the permitting therein by either of such use. Section 344 defines a common gambler as a person who owns a place for gambling, or who hires or allows a room to be used for such purpose, or who engages as dealer, gamekeeper or player in any gambling or banking game. Violations of this section are made a felony. The condition of

the bond has no special reference to either of these sections. What is required of the principal is, not that he will respect the Penal Code alone, but that he will not suffer "any gambling" in the premises. The place where liquor is sold was not deemed by the Legislature a suitable locality for gambling in any form, and yet the Liquor Tax Law prescribes no penalty, civil or criminal, for suffering or permitting it in the licensed premises. It seems quite clear, therefore, that the intention was not to limit a recovery upon the bond to the civil or criminal penalties prescribed in the act for violations of its provisions. The alternative, therefore, in the illustrative example referred to, is either a recovery of the full penal sum specified in the bond, or practically nothing. The Legislature surely meant to enforce its policy in an effective manner. Its policy and will were that there should be no gambling of any kind in premises licensed to sell liquor. How could this be enforced if proof were required of the actual pecuniary loss to the People resulting from the commission of each act of violation or non-compliance? A construction requiring this would simply nullify the law. The People sustain no direct pecuniary injury from a game of cards for money between private individuals in a liquor saloon, and yet just such an act was one of those which the bond was designed to prohibit.

We may, however, go further and say that all the conditions of the bond denote a similar purpose. It is practically a bond for the principal's good behavior as defined in the conditions. Nothing would be gained here by an analysis of the principles upon which liquidated damages and penalties rest. It is sufficient to say that the intention of the Legislature was plainly to enforce its will and compel submission to its policy by requiring from principal and surety a distinct contract to pay a definite sum of money upon the breach of any one of the defined conditions of the instrument.

It is also contended that, even if the penal sum be treated as liquidated damages, such damages are satisfied by the payment of the civil or criminal fines prescribed in the act. What we have already pointed out is also an answer to this contention. There is, however, another answer. As the law read prior to the amendment of 1897, there were no civil penalties. (Laws of 1896, chap: 112, § 34.) There were provisions only for criminal fines and for the recovery thereof upon the bond. It is evident that, under this original act of 1896, it was not intended to limit the

surety's liability to these fines, even treating them as liquidated damages. If that had been the intention, liability would have been dependent, *first*, upon proof of the principal's guilt, not by a preponderance of evidence, but beyond a reasonable doubt; and, *second*, upon the discretion of the trial court in awarding punishment. If imprisonment without fine were awarded, there would be no liability at all. The principal would first have to be found guilty beyond a reasonable doubt, and then fined. The bond on this construction would have been a sham and a farce. If, however, the main penal sum were treated as liquidated damages, the act was harmonious and the bond efficacious. If the official entitled to bring an action upon the bond chose to sue for the criminal fine and for that alone, he could do so, and in that case he might rest upon the conviction and sentence. Upon the docketing of the judgment for the fine as provided in section 36, the official was authorized by the last paragraph of that section to proceed to collect the amount of such judgment, together with the costs of collection, from the sureties on the bond. The sureties having in effect contracted to pay any such judgment, the official in the action against them was not bound to go behind it and prove the offense which resulted in the judgment. Upon the other hand, if the official sued for the full penal sum specified in the bond, as for a breach of one or more of the prescribed conditions, he had to prove the breach by independent evidence. The bond was clearly intended to cover the two contingencies and the two remedies. Civil penalties are now prescribed. (Laws of 1896, chap. 112, § 42, as amd. by Laws of 1897, chap. 312.) The act of 1896 was thereby amended to harmonize with this additional feature. To the original conditions of the bond, as prescribed in section 18, was added by the act of 1897 the further condition "that all fines and penalties which shall accrue during the time the certificate applied for is held and any judgment or judgments recovered therefor, will be paid, together with all costs taxed or allowed," thus plainly covering these new civil penalties. This is emphasized by the amendment embraced in the last paragraph of the section. That paragraph authorizes the State Commissioner of Excise, "without previous prosecution or conviction for violation of any provision of the Liquor Tax Law, or for the breach of any condition of said bond, commence and maintain an action, in his name, as such commissioner * * * for the recovery of the penalty for the breach of any condition of any

bond, or for any penalty or penalties incurred or imposed for a violation of the Liquor Tax Law." Coupling this with section 42 (*supra*) the scheme of the act as amended becomes entirely clear. All questions as to the proper plaintiff in actions upon bonds given under the act, or in actions for penalties incurred, are set at rest. The State Commissioner of Excise is authorized to sue the principal for the civil penalties. He is also authorized to sue both principal and surety for the breach of any condition of the bond. These suits are independent. In the action for the civil penalties he may recover from the principal more or less than the penal sum specified in the bond, dependent upon the number of violations proved. Having thus secured his judgment against the principal, he may recover the amount thereof (to the extent of \$1,600) from the surety in an action upon the bond. In such an action against the surety he need only prove the judgment against the principal. He may, however, recover upon the bond, independently, the full penal sum upon proof of the breach of any one of its conditions. The prescribed bond, plus the prescribed civil and criminal penalties, constitute the totality of legislative precaution. From the moment the tax is paid there is no trace anywhere of pecuniary interest in the People. Bond and penalties alike are then aimed at one definite end, obedience to the law and decent and orderly conduct of the business authorized by it. We think it clear that the plaintiff was, therefore, entitled to recover the penal sum of \$1,600 according to the true intent and meaning of the contract.

The conclusion at which we have arrived is in entire accord with the views of the Appellate Division in the fourth department as expressed in Mr. Justice Mc LENNAN's careful opinion in *Lyman v. Rochester Title Insurance Co.* (37 App. Div. 236.) It is also supported by the reasoning in *People ex rel. Meakim v. Eckman* (63 Hun, 209)—a somewhat analogous case under the former excise act—and also by Mr. Justice DAVY's opinion at Trial Term in the late case of *Lyman v. Brucker* (26 Misc. Rep. 594).

There was no disputed question of fact to go to the jury. The evidence was uncontradicted and unimpeached. This was not a criminal action either in form or substance. It was simply a civil action upon a contract, and was so properly treated. The propriety of directing a verdict upon undisputed facts in such an action can not be questioned.

It follows that the judgment appealed from is right and should be affirmed with costs.

VAN BRUNT, P. J., RUMSEY, PATTERSON and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

First Appellate Department, April, 1899. Reported. 39 App. Div. 661.

HENRY H. LYMAN, as Commissioner, etc., Respondent, *v.* GRAMERCY CLUB, Defendant, Impleaded with FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant.

APPEAL by the defendant Fidelity and Deposit Company of Maryland from a judgment against it entered upon a direction at Trial Term.

Mr. James R. Soley, for the appellant.

Mr. Royal R. Scott, for the respondent.

BARRETT, J. The main question here is the same as that which we have considered in the case of the present plaintiff against the Shenandoah Club. Our opinion in the latter case covers the present, and so far as concerns the legal questions presented, calls for an affirmance of this judgment. The appellant, however, contends that the testimony here was not, as in the Shenandoah case, so clear and conclusive as to warrant a direction. We have examined the testimony and are unable to perceive any substantial difference between the facts of the two cases. That the Gramercy Club was an existing corporation when it applied for a license was sufficiently proved. The fact too was recited in the bond, and the appellant is estopped from denying that recital. (*M. L. I. Co. v. Bender*, 124 N. Y. 47). It is said that it was one Corey who violated the law and not the corporation. But it clearly appears that Corey was acting throughout for the corporation. He in fact practically *was* the corporation. It appears

that Corey went through some such performance as the purchase of the Club's charter — whatever, under the circumstances, that may mean — and that thereafter three or four persons got together and said "We are the Gramercy Club." Thereafter Corey conducted the business. Plainly he was in a legal sense the agent of the corporation, or else he was in effect a corporation sole. He was certainly all there was of the corporation. If he were to be treated here as a principal apart from the corporation, it would be an easy and effective way not only of evading the bond and all responsibility thereunder, but of evading and nullifying the Liquor Tax Law. The Gramercy Club was, it would seem, enough of a corporation to secure a license. It was as much or as little of a practical nonentity then as it was when its "owner" or agent violated the law for it. Such devices can never avail to defeat the law. There was no real conflict of testimony upon any material point. Whether the principal and surety upon this bond were liable was a question of law, dependent upon the effect of the undisputed facts. We think the learned trial judge correctly held that there was nothing to go to the jury, and that the undoubted violations of law which were proved were violations of the principal in this bond, for which the surety is clearly liable.

The judgment was right and should be affirmed with costs.
All concur.

First Appellate Department, April, 1899. Reported. 39 App. Div. 671.

In the Matter of the Application of GEORGE P. FALL for the Revocation and Cancellation of a Liquor Tax Certificate, Issued to PATRICK MEEHAN.

Order affirmed, with costs. No opinion.

Second Appellate Department, April, 1899. Reported. 40 App. Div. 46.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate No. 10,320, Issued to MALCOM BREWING COMPANY, Respondent.

H. W. MICHELL, Special Deputy Commissioner of Excise for the County of Kings, Respondent.

Revoking a liquor tax certificate—A sale of beer from kegs on baseball grounds, in addition to that sold in the barroom, considered not to require payment of an additional tax.

Upon an application made to revoke a liquor tax certificate for an alleged violation of section 11 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312) providing that "if there be more than one barroom or place on the premises * * * at which the traffic in liquors is carried on under any subdivision of this section a like additional tax is assessed for each such additional barroom or place," it appeared that the certificate in question authorized the defendant, a brewing company to sell liquor on certain baseball grounds, and that, in addition to a bar at the location named in the petition, kegs of beer were placed at other points upon such grounds when games were in progress, and that waiters would bring orders from spectators to the men in charge of the kegs, delivering checks for the beer taken by them, for which checks they were responsible, and collecting money for such sales from the customers.

Held, that the sales of liquor so made by the waiters were to be considered as incidents to the main business carried on in the barroom and not as constituting the maintenance of a separate and independent place for the sale of liquor.

Quære, whether if the sale of liquor on the grounds were so disconnected with the business carried on in the barroom as to be beyond the permit of the license, the brewing company was responsible therefor, the business at the time being carried on by a party to whom the company sold beer, who received the profits of the business and who had title to the liquor sold.

APPEAL by the petitioner, Henry H. Lyman, as State Commissioner of Excise, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 30th day of November, 1898, denying his application for an order revoking the liquor tax certificate issued by H. W. Michell, Special Deputy Commis-

sioner of Excise for the county of Kings, to the Malcom Brewing Company.

S. B. Mead, for the appellant.

J. F. Bullwinkel, for the respondent Malcom Brewing Company.

CULLEN, J.:

The respondent, the Malcom Brewing Company, had a liquor tax certificate authorizing the sale of liquor on the Washington Park baseball grounds in the borough of Brooklyn. In the application for the license, the location of the bar was stated to be on the north side of Third street, 350 feet east of Third avenue. There was a bar on the premises at the location named, but when games were being played on the grounds, kegs of beer were placed at other locations; waiters would take the orders of spectators on the various stands through the grounds and bring these orders to men in charge of the kegs, who would furnish them glasses of beer to be delivered to the customers; the waiters on receiving the beer would give checks or tickets for the beer taken, for which they were held responsible, and would collect money for their sales from the customers. The petitioner claims that this mode of carrying on the sale of liquor was a violation of the Liquor Tax Law, and for such violation he seeks, under the provisions of section 28 of the statute (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), to revoke the respondent's license.

It is very doubtful whether the Malcom Brewing Company, on the record before us, was responsible for the sale of liquor which is claimed to have been illegal. The business was carried on by one Harry M. Stevens, to whom the company sold beer and gave the use of the certificate. The sales were made entirely by Stevens or his agents, the profits of the business were his and the title to the liquor sold was in him. We do not see that any relation of agent or servant existed between Stevens and the company. Having permitted the use of the certificate by Stevens for the sale of liquor at the bar, or place specified in the certificate, it may be that, for any infraction of the law there committed, or committed in connection with the business there carried on by Stevens, the company would be responsible. But if the sale of liquor in the

field was so disconnected with the business carried on in the bar-room as to be beyond the permit of the license, it is questionable whether it would not be equally beyond the implied authority given by the company to Stevens, and solely the illegal act of Stevens himself.

However this may be, we are of opinion that no violation of the law was proved, nor any false statement in the application for the certificate shown. The bar was located correctly in the petition, and no other bar or place for the sale of liquor, in the proper sense of those terms, was maintained on the grounds. By subdivision 6, section 11 of the Liquor Tax Law, as amended in 1897, it is provided: "If there be more than one bar, room or place on the premises, car, steamboat, vessel, boat or barge, at which the traffic in liquors is carried on under any subdivision of this section, a like additional tax is assessed for each such additional bar, room or place." The terms of this provision are very broad and sweeping; still they must be construed reasonably. By section 31 of the act, as amended, the keeper of a hotel may sell liquor to his guests with their meals or in their rooms, except between the hours of one o'clock and five o'clock in the morning, but not in the barroom or other similar room of such hotel. It will hardly be claimed that a certificate must be taken out for the dining room, or the rooms of the guests who are there served with liquor; nor can it be argued that the provision of law quoted gives hotels a special exemption from paying more than a single license fee. The only object of the provision is to take hotels out of the prohibitory clauses of the section which forbid the selling of liquor on Sundays and days of general or special election and the like. If it is construed as an affirmative grant of permission for a hotelkeeper to sell liquor to his guests, then it follows that he can at no time sell liquor to a guest in the bar-room, though that place is open to the rest of the world for resort. There is also to be considered the case of restaurants (not hotels), which, when of any pretension or character, have their dining rooms or eating rooms separate from the barrooms. It is certainly customary to serve wines or liquors in the dining room with meals. There are many music or other gardens where liquor is sold. It would be unreasonable to hold that in no such place could a patron be served with beer, wine or liquor except in the barroom, unless additional certificates are taken out, for what — for each table? We concede that, under the law, if a second bar-

room, or place distinctively for the sale of liquor, is maintained, an additional tax certificate must be taken out to cover it. But where no other bar or place of the character is maintained, we think refreshments may be served by waiters to persons not in the barroom, without a violation of the law. Such practice seems to be contemplated by the statute itself. By subdivision 1, section 11, it is directed that a tax shall be assessed upon the business of trafficking in liquors to be drunk upon the premises where sold, or which are so drunk, whether in a hotel, restaurant, saloon, or in an outbuilding, yard or garden appertaining thereto or connected therewith, thus recognizing that liquor may be sold, or at least served, in connecting gardens.

It is plain that the delivery of beer to the waiters by the man in charge of the keg did not constitute the sale. The system adopted of requiring tickets or vouchers from the waiters was simply a mode of insuring a proper accounting for the money received by them. The sales in this case occurred when the waiters delivered the beer to the spectators on the grounds and received payment therefor. That they got the beer from the keg in the field is of no more consequence than if they had taken it from the cellar. The sales so made by the waiters should fairly be considered as mere incidents to the main business carried on in the barroom, and not as constituting the maintenance of a separate and independent place for the sale of liquor.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Second Appellate Department, April, 1899. Reported. 40 App. Div. 133.

In the Matter of the Application of DANIEL W. PURDY, Appellant, for an Order Revoking and Canceling a Certain Liquor Tax Certificate Issued to WILLIAM P. DRISCOLL, Respondent, by FRANCIS M. CARPENTER, as the County Treasurer of Westchester County.

Liquor Tax Law—Closed doorways are not “entrances”—A substantial compliance, as to rooms in a hotel, is sufficient.

Upon a motion made under section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312) for the revocation of a liquor tax certificate because of the alleged falsity of statements contained in the application therefor, the statements are not to be strictly construed against the applicant, if it appears that there was an evident intention on his part to comply with the spirit of the law.

Doorways which have been permanently closed are not “entrances” within the meaning of subdivision 8 of section 17 of the Liquor Tax Law.

A liquor tax certificate for premises described as a hotel will not be revoked because at the time the application was filed there were not ten rooms in the house properly equipped for guests, as required by the statute, where it appears that at such time there was space for these rooms and that the owners of the property were then actively engaged, in evident good faith, in preparing them, and that they were actually completed and furnished in the manner required by law within a month of the time when the certificate was granted.

Bartlett, J., dissented.

APPEAL by the petitioner, Daniel W. Purdy, from a judgment of the Supreme Court in favor of William P. Driscoll, entered in the office of the clerk of the county of Westchester on the 14th day of November, 1898, denying the petitioner's application, and also from an order made at the Westchester Special Term and entered in said clerk's office on the 14th day of November, 1898, upon which said judgment was entered.

Cyrus A. Bishop, for the appellant.

No appearance for the respondent.

WOODWARD, J. The petitioner is a neighbor of William P. Driscoll, who is engaged in the liquor business under the provisions of the Liquor Tax Law, and it is claimed on behalf of the

petitioner that the said William P. Driscoll made certain false statements, sufficient to invalidate his liquor tax certificate, in his application for the same. This proceeding is brought under the provisions of section 28 of chapter 112 of the Laws of 1896. Upon a hearing of the parties, the court at Special Term decided that the petitioner had failed to sustain the allegations made in the petition, and directed a judgment in favor of the respondent. From this judgment the appeal comes to this court.

While it is undoubtedly true, as a reading of the evidence discloses, that some of the statements made in the application of the respondent were not technically accurate, when we take into consideration that the primary object of the Liquor Tax Law is the raising of a revenue, and that the State, in accepting the fee, is bound to act in good faith with the person taking out the certificate, we think the evidence is not sufficient to warrant the court in depriving the respondent of the benefits of his investment. The statute evidently contemplated that the declarations of the applicant should not be strictly construed against him, if there was an evident intention to comply with the spirit of the law, for it is provided (§ 28, subd. 2) that, upon the hearing of the parties, "If the justice or court is satisfied that material statements in the application of the holder of such certificate were false, or that the holder of such certificate is not entitled to hold such certificate, an order shall be granted revoking and cancelling such certificate." In the original statute this determination of the court was made final, but this clause was dropped in the amendments adopted in 1897. (Laws of 1897, chap. 312, § 19.)

It appears from the petition and the evidence that the petitioner's residence is within the distance of two hundred feet from the hotel of the respondent, and that three of the doorways of the respondent's hotel are within two hundred feet of the nearest doorway of the petitioners house, which is used exclusively as a dwelling house; but it also appears from the evidence that these doorways have been nailed up, one of them having been changed into a window, and that they are no longer used as entrances. The statute (Liquor Tax Law, § 17, subd. 8, as amd. by chap. 312, Laws of 1897) provides that when the "nearest entrance to the premises described" is less than 200 feet from the nearest entrance of a building occupied exclusively as a dwelling, measured in a straight line, it shall be necessary to have the written consent of two-thirds of the owners of premises so

situated; but it can hardly be contended that a doorway which has been permanently closed is an "entrance" within the meaning of the statute. The fact that such door might be opened by removing the nails or the boards across it, has no bearing upon the question; an entrance might be made in a solid wall, but so long as it is not, the petitioner would have no right to complain. It is admitted that these doors have not been used as entrances since the date of the application, and upon this point there is clearly no reason to disagree with the conclusion of the court at Special Term.

In respect to the bedrooms, the statute requires that there should be ten rooms properly equipped for guests, independent of those used by the servants and family, and the evidence discloses that while there were not ten rooms in the house meeting the requirements at the time the application for a liquor tax certificate was made, there was space for these rooms, and the owners of the property were actively engaged, in evident good faith, in preparing the same at the time, and that the rooms were actually completed and furnished in the manner required by law within a month of the time the certificate was granted. For the State to take this respondent's money and then to cancel his certificate because of a technical misstatement of facts, in nowise going to the merits of the question, could not be justified by any correct process of reasoning. One object of the law was to compel the selling of liquors under suitable conditions; and the mere fact that some portions of the house, large enough to meet all of the requirements, were not completed at the time of the application is not material, if it appears to the satisfaction of the court that the respondent was acting in good faith, and actually engaged in the construction of the rooms, as described in the application, and that he actually completed this construction within a reasonable period. This is a question left by the statute to the discretion of the court, and, it not appearing from the evidence that there has been any abuse of that discretion, in so far as the bedrooms are concerned, the judgment appealed from must be affirmed, unless it appears that there are other reasons for its reversal.

It is urged by the petitioner that the dining room fails to meet the requirements of the law (§ 31, subd. 2) in that it does not contain the necessary 300 square feet of floor space. The petitioner, in his moving papers, makes no mention of any defect

in the premises in so far as the dining room is concerned; his petition deals with the entrances and the bedrooms; while the statute (Laws of 1896, chap. 112, § 28) requires that the petition shall "state the facts upon which such allegations are based," and, in the absence of anything in the petition in reference to the dining room, the petitioner is in no position to urge the matter before this court on appeal. The only evidence upon the question, which was incidentally developed, is found at folio 95, where an excise inspector testifies that "on the ground floor back of the barroom there were two rooms of equal size. One was being used as a dining room, which had about 200 square feet, I should imagine. The other room, of equal size of the dining room, had a cot in it, and was apparently used as a bedroom at the time, but Mr. Driscoll said the two rooms were to be merged into one, to be a dining room of the legal size." Obviously this evidence is not sufficient to overcome the presumptions in favor of the statements made in the application, even if it has any proper place in the proceedings.

The suggestion that the law is not complied with because two of the ten rooms are connected by a door between them was not set forth in the petition, and, if it was, it is unworthy of serious consideration. The law did not contemplate making any foolish requirements, and nothing is more common in all hotels than connecting rooms. The requirement for partitions was not to prevent access from one room to another, but was designed to put a stop to the evasions of the spirit of the law, and to compel those who sought hotel liquor tax certificates to maintain hotels which should, in fact, be designed for the purpose of caring for guests rather than the sale of liquors.

The order and judgment appealed from should be affirmed, with costs.

All concurred, except BARTLETT, J., who dissented on the ground that there was not a substantial compliance with the Liquor Tax Law as to the number of rooms in the building.

Order affirmed, with ten dollars costs and disbursements.

Second Appellate Department, May, 1899. Reported. 40 App. Div. 619.

In the Matter of the Application of WILLIAM P. WOOD for an Order Revoking and Cancelling Certificate of License, etc., Issued to PHILIP H. VICTORY.

Order affirmed, with ten dollars costs and disbursements.

No opinion.

All concurred.

Third Appellate Department, May, 1899. Reported. 41 App. Div. 12.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. GEORGE W. CHASE, Respondent.

Liquor Tax Law—A violation of, by having open an entrance to a room where liquor is sold—The Court of Special Sessions has exclusive jurisdiction thereof—Such violation is not "trafficking in liquors."

Under subdivision 2 of section 35 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312) the Court of Special Sessions has exclusive jurisdiction of a violation of subdivision g of section 31 of the Liquor Tax Law, which provides that no door or entrance to a room where liquors are sold shall be open or unlocked during the hours when the sale of liquors is forbidden, and the violation of which is made a misdemeanor by subdivision 5 of section 34 of that law.

The act prohibited in subdivision g does not constitute "trafficking in liquors" within the meaning of subdivision 2 of section 34 of the Liquor Tax Law, the violation of which subdivision is, by subdivision 1 of section 35, to be prosecuted by indictment.

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the County Court of Schenectady county in favor of the defendant, rendered on the 9th day of January, 1899, sustaining the defendant's demurrer to the indictment, upon the ground that the same did not state facts constituting a crime, and that the court had no jurisdiction of the subject-matter thereof.

The objection to the jurisdiction was also taken by motion to dismiss after a plea of not guilty; the motion was denied, and the plea of not guilty was withdrawn, and the demurrer interposed, which was sustained.

The indictment is in the following words:

“County Court of the County of Schenectady.

“THE PEOPLE OF THE STATE OF NEW YORK against GEORGE W.
CHASE.

“The grand jury of the county of Schenectady, by this indictment, accuses George W. Chase of the crime of violating sec. 31, subdivision G, Laws 1896, as amended by chap. 312, Laws 1897, committed as follows:

“The said George W. Chase on the 24th day of July, 1898, at the town of Duaneburgh in this Schenectady county, being the first day of the week commonly called Sunday, between the hours of 3 o'clock, P. M. and 8 o'clock, P. M., on the said 24th day of July 1898, unlawfully and wilfully and with unlawful and wilful intent at the hotel or saloon known as the American Hotel in the village of Quaker Street, this county, of which hotel said George W. Chase was proprietor, did unlawfully and knowingly and with unlawful and wilful intent and without authority or license therefor, have open and unlocked the door or entrance from the street, highway, yard, hallway, room or adjoining rooms where liquors are sold or kept for sale during the hours when the sale of liquors was forbidden, and by admitting to such room or rooms persons not members of his family, for purposes forbidden by such statute in such case made and provided.

“WM. W. WEMPLE,

“*District Attorney of the County of Schenectady.*”

William W. Wemple, District Attorney, for the appellant.

Walter Briggs, for the respondent.

LANDON, J. The indictment was intended to be framed under subdivision g of section 31 of the Liquor Tax Law (Chap. 112 of the Laws of 1896), as amended by chapter 312 of the Laws of 1897, which provides that it shall not be lawful for any person “To have open or unlocked any door or entrance from the street, alley, yard, hallway, room or adjoining premises, *to the room or rooms* where any liquors are sold or kept for sale during the hours when the sale of liquors is forbidden, except,” etc.

The objection that the indictment does not state facts constituting a crime rests mainly upon the fact that it is not clearly stated therein that the door which the defendant is charged with having open or unlocked is *from* any one of the specified places *to* the room or rooms where liquors were sold or kept for sale.

We pass this question and come to the graver question which the defendant presented by demurrer, and also under the plea of not guilty, that the County Court had no jurisdiction of the subject-matter. The County Court sustained this objection under the demurrer, instead of under the plea of not guilty, and as the learned district attorney takes no objection upon that ground, but desires to have the question of jurisdiction decided, we proceed to its examination.

The jurisdiction of the County Court is challenged under subdivision 2 of section 35 of the act, as amended by chapter 312 of the Laws of 1897, which provides: "Courts of Special Sessions shall have exclusive jurisdiction to try and determine, according to law, all complaints for violations of sections forty and forty-one of this act, and also all violations of the liquor tax law, defined by subdivision five of section thirty-four, as a misdemeanor."

Subdivision 5 of section 34 declares: "Any wilful violation by any person of any provision of this act, for which no punishment or penalty is otherwise provided, shall be a misdemeanor."

Subdivision 1 of section 35 provides that "Except as otherwise provided by this act, all proceedings instituted for the punishment of any violations of the provisions of this act, the penalties for which are prescribed in subdivisions one, two, three or four of section thirty-four, shall be prosecuted by indictment by the grand jury of the county in which the crime was committed, and by trial in a Court of Record having jurisdiction for the trial of crimes of the grade of felony," except that a magistrate shall have jurisdiction of the preliminary proceedings resulting in the arrest, examination, bail, commitment or discharge of the accused.

Subdivisions 1, 2, 3, and 4 of section 34 prescribe specific punishment upon conviction for various violations therein forbidden. Subdivision 2 provides that "Any corporation, association, copartnership, or person * * * who shall violate the provisions of this act by trafficking in liquors contrary to the provisions of sections eleven, twenty-two, twenty-three, twenty-four, thirty or thirty-one shall be guilty of a misdemeanor, and

upon conviction therefor shall be punished by a fine of not more than five hundred dollars or by imprisonment," etc.

We do not think that the act of keeping a door open or unlocked, prohibited in subdivision g of section 31, is trafficking in liquor within the meaning of the act. Trafficking in liquor is defined in section 2 of the act as amended in 1897, as embracing various kinds of sale and distribution of liquor, as follows:

" 'Trafficking in liquors' within the meaning of this act is:

"1. A sale of less than five wine gallons of liquor; or,

"2. A sale of five wine gallons or more of liquor, in which less than five gallons of any one kind or quality is included; or,

"3. A sale of five wine gallons or more of liquor, any portion of which is intended or permitted to be drunk on the premises where sold; or,

"4. A sale of five wine gallons or more of liquor, when the liquor so sold is delivered or agreed to be delivered in a less quantity than five wine gallons at one time; or,

"5. The distribution of liquor by, between or on behalf of members of a corporation, association or copartnership to a member thereof, or to others, in quantities less than five gallons."

Section 11 prescribes the taxes imposed upon the business of trafficking in liquors, specifying it as "Upon the business of trafficking in liquors to be drunk upon the premises where sold," subdivision 1; "in quantities less than five wine gallons, no part of which shall be drunk on the premises," subdivision 2; "by a duly licensed pharmacist," subdivision 3; "upon any car, steamboat or vessel," subdivision 4.

Section 22 imposes "restrictions on the traffic in liquors in connection with other business."

Section 23 enumerates "persons who shall not traffic in liquors."

Section 24 enumerates places "in which traffic in liquor shall not be permitted."

Section 30 enumerates "persons to whom liquor shall not be sold or given."

Section 31 prohibits the sale of liquor except under the license and terms and conditions specified in the act, and then makes it unlawful to sell, offer, or expose for sale or give away any liquor on Sunday; within specified hours; on specified days within a certain distance of voting places, and within a certain distance of other places. It also prohibits the sale of adulterated liquors; and the sale of liquor by certain persons. Thus the various

methods of trafficking in liquor are catalogued, those which are permissible, if licensed, as well as those which are absolutely forbidden, and those whose permissibility or prohibition depends upon time, place, circumstance or persons.

Then follows subdivision g, upon which this indictment is based. This is not a specification of some kind of traffic in liquor like the previous provisions and like some following it, but a regulation of the place or room or rooms where "any liquors are sold or kept for sale during the hours when the sale of liquors is forbidden."

Manifestly it was the intent of the Legislature to punish not only the prohibited traffic in liquors, but in addition, and as an aid to the suppression of such prohibited traffic, to prohibit certain acts which would, if permitted, lead to the violation of the prohibition of the traffic itself, somewhat in the nature of acts prohibiting the carrying of concealed weapons—the carrying is no offense *per se*, but, if not carried, the weapons will not so often become the means of offense. The keeping of the door of a saloon open or unlocked opens the door to the traffic, but is not the traffic itself; the opportunity for offense is prohibited in order to make the prohibition of the offense itself more effective. It may or may not be intended as an offer to traffic, and, therefore, we can not, in a criminal case, in the absence of further statement, hold that it is a charge of an offer to traffic in liquors or to sell them.

The punishment of the unlawful traffic is, as a general rule, specified—perhaps it is in all cases, we are not now called upon to look for omitted cases—and prosecution by indictment is prescribed. The punishment of the particular collateral offense specified in subdivision g of section 31 is not particularly prescribed, and therefore, it is one of the misdemeanors mentioned in subdivision 5 of section 34, and hence within the exclusive jurisdiction of courts of Special Sessions, as provided in subdivision 2 of section 35.

Fourth Appellate Department, May, 1899. Reported. 41 App. Div. 178.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MELVILLE M. CRANE, Appellant, v. JAMES K. CHANDLER, as Town Clerk of the Town of Moravia, N. Y., Respondent.

Town meeting—Notice of an intention to submit the liquor license questions, when sufficient.

The fact that but four days' notice was given of an intention to submit to the voters of a town at the annual town meeting the liquor license questions, as provided in the Liquor Tax Law (Laws of 1896, chap. 112, § 16), instead of the twenty days' notice required by section 34 of the Town Law (Laws of 1890, chap. 569), does not necessitate the resubmission of the questions to the electors at a special town meeting, where it appears that the notice actually given was effective, and that the electors of the town acted upon it in the method prescribed by the statute.

APPEAL by the relator, Melville M. Crane, from an order of the Supreme Court, made at the Cayuga Special Term and entered in the office of the clerk of the county of Cayuga on the 1st day of May, 1899, denying his motion for a peremptory writ of mandamus directed to James K. Chandler, as town clerk of the town of Moravia, N. Y., requiring him forthwith to call a special town meeting of the electors of said town for the purpose of voting on the liquor license questions.

Hull Greenfield, for the appellant.

S. Edwin Day, for the respondent.

HARDIN, P. J.: January 12, 1899, there was filed with the town clerk a written petition signed by the electors of said town to the number of ten per cent of the vote cast at the next preceding general election held in that town, which was acknowledged as required by law, requesting the submission at the then next annual town meeting to be held in said town of the questions provided to be submitted at the annual town meeting by section 16 of the Liquor Tax Law (Laws of 1896, chap. 112). The town clerk provided ballots for the submission of said questions at the annual town meeting held in said town on February 21, 1899, and the ballots which were provided by the clerk were actually furnished to voters at said town meeting, and upon a canvass

and count of said votes so cast upon said questions it was ascertained and declared, by the election officers charged by law with such canvass and count, that a majority of the votes cast upon said questions had been and was in the negative, "except question number three, and as to said latter question the majority of the votes cast thereon was in the affirmative."

The relator claims that by reason of the failure to give notice of the taking of said vote upon said questions at said town meeting that such vote would be by ballot as aforesaid, "the said questions were not properly submitted to the electors of said town at said town meeting."

In the affidavit of the defendant is a schedule of the propositions, under the Liquor Tax Law, as they were submitted at the annual town meeting, and his affidavit states: "And such propositions were properly submitted to the electors of said town, and were then voted on by said electors, and the number of affirmative and negative ballots cast on said several propositions then and there, by said voters, and the number of blank ballots on each of said propositions, appear on said Schedule A, and the majorities for or against each proposition."

The first question submitted was: "Shall any corporation, association, copartnership or person be authorized to traffic in liquors under the provisions of subdivision one of section eleven of the liquor tax law in the town of Moravia?" Upon that question it appears that there were 156 affirmative votes and 317 negative votes. The blanks on that question were 194. The question was defeated by a majority of 161 votes.

To the second question propounded, viz.: "Shall any corporation, association, copartnership or person be authorized to traffic in liquor under the provisions of subdivision two of section eleven of the Liquor Tax Law in the town of Moravia?" the affirmative votes were 128 and the negative votes were 302. That question was defeated by a majority of 174 votes.

To the third question propounded, viz.: "Shall any corporation, association, copartnership or person be authorized to traffic in liquor under the provisions of subdivision three of section eleven of the Liquor Tax Law in the town of Moravia?" the votes were 279 yeas and 230 nays, and the question was declared carried in the affirmative by a majority of 49 votes.

To the fourth question, viz.: "Shall any corporation, associa-

tion, copartnership or person be authorized to traffic in liquors under subdivision one of section eleven of the Liquor Tax Law, but only in connection with the business of keeping a hotel, in the town of Moravia, if the majority of the votes cast on the first question submitted are in the negative?" there were cast in the affirmative 272 votes and in the negative 301 votes.

It appears that every person who desired to vote at said election on the propositions, or either of them, who attended the town meeting or election to vote, was furnished a ticket, and every voter but two took such ticket with him into his booth and cast his vote in accordance with the law. It appears that the whole number of votes cast for supervisor at said town meeting was 678, which was the combined highest vote for any office. The total vote cast at the town meeting in 1896 was 568; in 1897, 600; in 1898, 568.

It appears by the affidavit used upon the motion that the clerk, four days before said town meeting, posted "conspicuously in four of the most public places of said town" a notice of the candidates to be voted for at said town meeting, and the notice contained the following language, to wit:

"The license question, as provided by the Raines law, will be submitted to the voters at this town meeting.

"JAMES K. CHANDLER,
Town Clerk."

Upon an affidavit made by the relator on the 21st day of April, 1899, he gave notice of intention to make an application at Special Term for an order directing the issuing out of and under the seal of this court of a peremptory writ of mandamus, directed to the clerk, directing him "to forthwith call a special town meeting of the electors of said town for the purpose of voting, by ballot, upon the four propositions contained in and provided for in section sixteen of the Liquor Tax Law."

The application for a mandamus was heard on the 29th day of April, 1899. It appears by the affidavit used at the Special Term that "No order has been issued by any court or judge for the calling of a special town meeting in said town," nor has any such order been filed with the town clerk.

By an amendment to section 16 of the Liquor Tax Law in 1899 (Chap. 398), which amendment took effect on the twenty-second of April of that year, relating to special town meetings, it was

provided: "Such special town meeting shall only be called upon the filing with the town clerk, the petition aforesaid and upon an order of the Supreme or County Court, or a justice or judge thereof, respectively, upon sufficient reasons being shown therefor." That amendment operated to inhibit the town clerk from calling a special town meeting without an order made by one of the courts mentioned or a justice or judge thereof.

It is contended in behalf of the appellant that the notice of intention to submit the questions to the electors ought to have been filed twenty days before the town meeting, and reference is made to section 34 of the Town Law (Laws of 1890, chap. 569). The affidavit seems to disclose facts indicating that the electors of the town had notice of the intention to submit the questions and that they acted upon such notice, and expressed their will in the mode prescribed by statute, and we have found no informalities sufficient to warrant us in saying that the conclusion reached by the electors was not efficient.

In *People ex rel. Hirsh v. Wood* (148 N. Y. 142) it was said by the court: "We can conceive of no principle which permits the disfranchisement of innocent voters, for the mistake or even the willful misconduct of election officers in performing the duty cast upon them. The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly qualified electors and not to defeat them. Statutory regulations are enacted to secure freedom of choice, and to prevent fraud."

We think the electors of the town of Moravia expressed their will in respect to the questions submitted to them, and that it can not be said that the election was irregular or inefficient.

It seems to be the policy of the law that such questions shall be submitted only once in two years to the electors of a municipality.

The views already expressed indicate that the Special Term committed no error in refusing the peremptory writ of mandamus requiring the clerk to call a special town meeting for the purpose of a resubmission of the questions.

All concurred.

Order affirmed, with taxable costs.

Fourth Appellate Department, May, 1899. Reported. 41 App. Div. 624.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, v. FRANK M. SWARTS, et al. Respondents.

This is an appeal from a judgment dismissing plaintiff's complaint upon plaintiff's opening of the case. Motion for non-suit was made upon ground that the facts stated by plaintiff's attorney in his opening did not constitute a cause of action. The complaint was restricted by a stipulation that the only issue was whether the sales under the license, having been made within two hundred feet of a church, constituted a forfeiture of the bond.

ROYAL R. SCOTT, attorney for plaintiff-appellant: The certificate issued by the county treasurer is not a license or permit to sell liquors. No person is authorized to traffic in liquors under the present law, except as the law authorizes. Paying the tax does not authorize a person to traffic. The right of an applicant to a certificate depends altogether upon the statements in the application. The officer issuing certificate has no discretionary power. (*People ex rel. Belden Club v. Hilliard*, 28 App. Div. 140.) Payment of the tax and receiving a certificate gives a person no right that he did not have, except that the condition precedent of payment of tax and posting of certificate has been complied with. The rule is to make such a construction as should repress the mischief and advance the remedy. (*People ex rel. Bagley v. Hamilton*, 25 App. Div. 428; *Matter of Lyman v. Korndorfer*, 29 App. Div. 390.) The phrase "holder of the certificate" as used in this statute, means the person authorized to sell liquor under it. (*People ex rel. Miller v. Lyman*, 27 App. Div. 527; affirmed 156 N. Y. 407; *Matter of Lyman v. Fagan*, 26 Misc. 300.) The provisions of the statute are in effect a part of the bond. The statute constitutes a part of the contract of the surety. (*Lyman v. Schenck and Rochester Title Insurance Co.*, 37 App Div. 234.) The burden is upon the defendant, when traffic is alleged and proved, to prove that he had a certificate properly posted and that such traffic was legal. Black on Intoxicating Liquors, Sec. 507; also sec. 511.

HUDSON & DWELLE, attorneys for defendant Swarts; HANFORD STRUBLE, attorney for defendant Harpending. The facts

alleged in the complaint as limited by the stipulation and as stated by the plaintiff's counsel in his opening to the jury did not state a cause of action upon the bond and complaint was properly dismissed. The application for tax certificate and the certificate issued constitute a contract between applicant and the State. (*Matter of Hilliard*, 25 App. Div. 222; *Matter of Livingston*, 24 App. Div. 51; *People v. Durante*, 19 App. Div. 292; *Niles v. Mathusa*, 20 App. Div. 483.) If the contract is void, then the bond never had any binding force or effect whatever. If the State had no right to make this contract and issue this tax certificate it cannot take advantage of its own wrong and maintain an action upon the bond given to procure a right the State could not confer or grant.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred.

Supreme Court, Kings Special Term, May, 1899. Reported. 27 Misc. 327.

Matter of the Application of HENRY H. LYMAN, State Commissioner of Excise, to Revoke the Liquor Tax Certificate of RAFFAELE SALATINO.

Liquor Tax Law (Laws of 1896, chap. 112, secs. 31, 34, as amended by Laws of 1897, chap. 312)—One licensed to sell liquors, not to be drunk on the premises, does not forfeit his certificate by selling liquors to be drunk thereon—Punishment.

Under the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), if a person, licensed only to sell liquors not to be drunk on the premises, sells liquors to be drunk thereon, he does not thereby forfeit his certificate, as his offense is only against that part of section 31 of said act which prohibits sales without an appropriate license, and he is punishable merely as for a misdemeanor in the manner prescribed in subdivision 1 of section 34.

PETITION to revoke a liquor tax certificate.

W. A. Cloutier, for petitioner.

L. J. Somerville, opposed.

GAYNOR, J. The respondent holds a liquor tax certificate for the sale of liquors not to be drunk on the premises (The Liquor Tax Law, sec. 11, sub. 2), but he sold liquor to be drunk on the premises, for which traffic he holds no certificate (sec. 11, sub. 1); and this is an application for an order revoking his certificate on that ground. The application is based on the provision allowing such revocation "on account of the violation of any provisions of this law, conviction of which would cause a forfeiture of such certificate" (sec. 28 sub. 2). It is provided that one "who shall violate the provisions of this act by trafficking in liquor contrary to the provisions of sections 11, 22, 23, 24, 30 or 31, shall be guilty of a misdemeanor, and conviction thereof shall be punished by a fine of not more than \$500 " or by imprisonment for not more than one year, or by both, "and shall forfeit the liquor tax certificate, and be deprived of all rights and privileges thereunder" (sec. 34 sub. 2). At the end of this subdivision it is provided that it "does not apply to violations of section 31 of this act, the punishment for which is provided in the first clause (subdivision) of this section." The part of section 31 thus referred to prohibits sales unless the appropriate certificate therefor has been obtained under section 11; and the first subdivision of section 34 thus referred to prescribes the punishment for such sales. It is contended that the respondent has not violated any of the said sections 11, 22, 23, 24, 30, but has only violated section 31 by selling liquor to be drunk on the premises without having a certificate therefor, but only a certificate to sell to be taken away; and that therefore he is only subject to the said punishment provided in section 34, subdivision 1, for selling without a certificate contrary to the said prohibition of section 31, and not to a forfeiture of his license. Upon reading sections 11, 22, 23, 24 and 30, it appears that the respondent has not sold liquor "contrary to the provisions" of any of them. The prohibitions and requirements thereof are not applicable to his case. The only provision he has violated is that of section 31 which prohibits sales without the appropriate license.

The application is denied.

Supreme Court, Monroe Special Term, May, 1899. Reported. 27 Misc. 360.

THE PEOPLE ex rel. AARON D. CLINT, *v.* JOHN B. HAMILTON, County Treasurer of Monroe County, and Nine Other Applications.

1. Liquor Tax Law—Defective “statement of the result of the vote” as to local option—Laws of 1896, chap. 112, sec. 16, subd. 4.

The duty imposed upon a town clerk by the Liquor Tax Law (Laws of 1896, chap. 112, § 16, subd. 4), to file with the county treasurer a “certified copy of the statement of the result of the vote” of an election held under the local option provision of that act, is not performed by his filing his own statement of the votes cast upon each proposition submitted.

2. Same—Refusal of county treasurer to issue liquor tax certificate.

Where a town has actually voted against the sale of liquor, a county treasurer may properly refuse to issue a liquor tax certificate, although the town clerk has filed with him a “statement of the result of the vote” which does not comply with the statute, as the county treasurer has no judicial powers and therefore no authority to pass on the legal sufficiency of the statement filed.

3. Same—Validity of election not reviewable—Decision of electors to be upheld.

Where the matter is brought before the court, it will not consider the collateral issue of the validity of the election.

The court will uphold the decision of the electors by every reasonable intent and to that end, before directing the issue by the county treasurer of a liquor tax certificate, will allow the town clerk five days for filing with the county treasurer a “statement of the result of the vote” sufficient under the statute.

PROCEEDINGS under writs of certiorari granted by William E. Werner, a justice of the Supreme Court of the seventh judicial district of the State of New York, to review the action of the several county treasurers in refusing to issue liquor tax certificates to certain relators.

George D. Forsyth, for relators.

P. W. Cullinan, for respondents.

WERNER, J.: The relators, as hotel proprietors in their respective towns in the several counties above named, have made applications for liquor tax certificates under subdivision 1 of section 11 of the Liquor Tax Act (Laws of 1896, chap. 112). It is conceded that they have complied with the formalities of the

statute, which by its terms, must precede or accompany the application. The several county treasurers have refused to issue such certificates upon the ground that a majority of the qualified electors of the several towns in which the relators reside have, pursuant to the provisions of section 16 of said Liquor Tax Act, voted against the sale of liquors in their respective towns.

The information upon which these refusals of the respondents are based is contained in the statements of the town clerks of the respective towns above named, of which the following is a sample copy:

"Statement of the vote of the town of Parma, on Local Option, at the annual meeting, held in said town, March 7, 1899:

"Question No. 1. No. voting 'Yes,' 33; 'No,' 258; blank, 386.

"Question No. 2. No. voting 'Yes,' 38; 'No,' 297; blank, 306.

"Question No. 3. No. voting 'Yes,' 80; 'No,' 264; blank, 295.

"Question No. 4. No. voting 'Yes,' 269; 'No,' 314; blank, 66.

"Dated March 10, 1899.

"HENRY BUFTON,
"Town Clerk."

It is conceded that the town clerks of the respective towns above named have filed with the treasurers of the respective counties above named such statements in attempted compliance with the provisions of subdivision 4 of section 16 of the Liquor Tax Act. The first question which arises in these proceedings is whether the filing of the statements above set forth is a compliance with the provisions of said subdivision and section, which are as follows:

"A certified copy of the statement of the result of the vote, upon each of such questions submitted, shall, immediately after such submission thereof be filed by the town clerk or other officer with whom returns of town elections are required to be filed by the election law, with the county treasurer of the county * * * and no liquor tax certificate shall thereafter be issued by such officers, etc." The meaning of the language just quoted is made plain by reference to the preceding sentences of the same subdivision which require that whenever the question of local option is submitted to the electors of a town "a return of the votes so cast and counted shall be made as provided by law." This language clearly refers to the statement of the result which the election officers are required to make under the election laws.

The methods of procedure enjoined by the election law, as well as the precise and unequivocal language of said subdivision 4 of section 16 of the Liquor Tax Act clearly indicate, therefore, that the town clerk's *duty* is to file with the county treasurer a "certified copy of the statement of the result of the vote," and not his own statement of such result. That the statements filed by the respective town clerks above named, with the respective county treasurers above named, are the statements of said clerks instead of certified copies of "the statement" which must be made, under the election law, is too obvious for serious argument.

It follows as a logical sequence that there has been no substantial compliance with the law requiring "a certified copy of the statement of the result of the vote" to be filed with the county treasurer. There was, however, an attempted compliance with the law as the result of which the said treasurers were informed of the action taken by the electors with reference to the sale of liquors in their respective towns. Being mere ministerial officers they had no authority to pass upon the legal sufficiency of the statements filed with them. Any statement containing the facts from which said treasurers could decide whether the question of local option had been voted on in a particular town was sufficient to call upon them to act in accordance with the facts set forth in the notice, and leave the question of its sufficiency for the courts to decide. Counsel for the relators contends with great force that unless the town clerk files with the county treasurer such a paper as the law requires, the latter must issue a liquor tax certificate to the applicant. This view cannot be accepted without the conclusion that the county treasurer is vested with judicial powers in deciding whether he will issue a liquor tax certificate or not. As I understand the argument of counsel for the relators he does not claim that a county treasurer has any judicial powers under the Liquor Tax Act. But the question is now before a judicial officer who is charged, by the express language of the statute, with the duty of determining the sufficiency of the statements filed by the respective town clerks of the towns referred to in said statements with the respective county treasurers above named under said subdivision 4 of section 16; and of deciding whether the applications for a liquor tax certificate made by the relators have been properly denied. That the statements filed herein were insufficient, is obvious. But it does not follow that the refusal to grant the liquor tax certificates

applied for was improper. The electors of the respective towns above named have legally and properly declared against the sale of liquors therein. The informality of the statement of that fact does not wipe out the fact. The election is as valid as though the law required no statement of the result to be filed with the county treasurer.

This is equally true whether the provision requiring such filing be treated as mandatory or merely directory. In either event all that remains to be done is to compel the town clerk to file such a statement as the law requires. Then the voice of the people will be as regularly and legally expressed as though it had been properly done in the first instance. It is, however, urged on behalf of the relators that until this is done the duty of the county treasurer, as well as of the court, is to see that the liquor tax certificate applied for is issued in accordance with the letter of the law; and that any such certificate obtained by an applicant not entitled thereto, can be revoked under subdivision 2 of section 28 of the Liquor Tax Law. There are two answers to this proposition. First, the law is not so unreasonable as to require public officers to do vain things which are clearly contrary to the spirit of the law and hostile to the intentions of its framers, although apparently within the literal letter thereof; and which are to be done only to be undone. Second, such a course of procedure would cast upon the electors of a town, who have legally decided that no liquors shall be sold therein, the burden of obtaining judicial sanction for what they have lawfully done. This would be both illogical and unjust. But it is further claimed on behalf of the relators that the vote taken in the respective towns above named upon the question of local option was not legally taken, and that therefore the relators are entitled to the liquor tax certificates applied for.

In the view which I entertain of these proceedings the legality of the elections in which the vote upon the liquor question was taken in the towns above named cannot be determined herein. That portion of subdivision 1 of section 28 of the Liquor Tax Act, which directs the judge or justice to determine upon the hearing under a writ of certiorari, whether an application for a liquor tax certificate has been denied by a county treasurer without good and valid reasons therefor, and requiring such judge or justice to make an order commanding such treasurer to issue such a liquor tax certificate where it has been improperly denied,

refers only to such evidence of the result of a vote upon the question of local option as will enable the judge or justice to decide whether the county treasurer, upon the facts shown by the record before him, has complied with the statute.

The question whether the vote was legally taken or not is entirely collateral to the issue in these proceedings. The legality of such vote must be tested in a direct proceeding in which the court has power to look behind the record and decide according to the facts, upon any essential question. I am not unmindful of the apparent anomaly presented by the seemingly inconsistent decision that although the town clerks above named have not filed the statement, which is the only official notice to a county treasurer that the electors of a town have declared against the sale of liquor, a county treasurer may refuse to issue a liquor tax certificate upon the ground that a vote was taken by which the electors have decided against the sale of liquors. But this incongruity is more apparent than real. The fact of the vote is admitted by the contention that it was illegal. Neither am I insensible to the embarrassment involved in the practice of permitting or directing a town clerk to perform a duty enjoined upon him by the statute, during the pendency of a proceeding based wholly upon the admitted nonperformance of such statutory duty. The absence of any specific provision in the Liquor Tax Act providing for such a contingency is simply one of those common imperfections in our laws which must be corrected in the light of experience. But in the confusion created by this doubt as to the method of procedure, one fact stands out clearly and boldly. That is that the people of these towns have, by the votes of their electors, declared against the sale of liquors. This decision should be upheld by every reasonable intendment. No mere technicality should be permitted to strangle or stay the popular will legally expressed. Ignorance, inadvertence, mistake or even intentional wrong-doing on the part of local officials should not be permitted to disfranchise a district. Until the statute, or some higher legal authority, provides for a different course I am disposed to follow the decision made by the learned county judge of this county in a similar case.

Let orders be entered in the several cases above entitled, directing the respective county treasurers to issue to the respective relators liquor tax certificates, pursuant to the respective applications made by them, unless within five days from the entry of

such orders the respective town clerks above referred to shall file with said respective county treasurers "a certified copy of the statements of the result of the vote," as required by said subdivision 4 of said section 16 of said Liquor Tax Act. No costs of these proceedings to either of the parties.

Ordered accordingly.

Supreme Court, Cortland Special Term, May, 1899. Reported. 27 Misc. 576.

THE PEOPLE ex rel. DORR C. SMITH, Petitioner, v. WILLIAM H. FOSTER, as Treasurer of the County of Cortland, N. Y., Respondent.

Liquor Tax Law—Vote against local option—Town clerk's certificate of the result—Justifiable refusal of county treasurer to issue liquor tax certificate.

A statement signed and filed by a town clerk with a county treasurer, showing, by a recapitulation of the votes cast on the four questions submitted to a town meeting on the issue of local option in the sale of liquor, that the town has voted against it, is a sufficient "certified copy of the statement of the result of the vote," within the provisions of the Liquor Tax Law, to justify the county treasurer in a subsequent refusal to issue liquor tax certificates in the town.

Seemle, that the duty of the town clerk in the premises is directory merely, and that no particular form for his certificate is prescribed by the statute.

A county treasurer acts ministerially and has no power to pass upon the validity of such a certificate.

Where the electors of a town have confessedly voted against local option, and the county treasurer knows that fact, the court will not thereafter compel him to issue liquor tax certificates, whether or not the town clerk has properly and sufficiently performed his statutory duty of informing the county treasurer of the result of the vote.

Unless a town, in which there is no license, has subsequently voted for local option and that fact is shown, a county treasurer has no power to issue a liquor tax certificate in such town.

APPLICATION to compel the county treasurer of Cortland county to issue fifteen liquor tax certificates to the several individuals, separately named in said petition.

Forsyth Brothers (Dougherty & Miller, of counsel), for petitioner.

P. W. Cullinan, for respondent.

FORBES, J.: This is a special proceeding instituted by the petitioner under section 28 of the Liquor Tax Law, passed March 23, 1896, and the amendments thereto. This proceeding and fourteen others were commenced by an application to this court to compel the respondent to issue fifteen liquor tax certificates to the several individuals, separately named in said petitions.

The proceedings, on the part of the petitioners, seem to be regular in form, showing upon their face that each applicant and petitioner had complied with the several provisions of the Liquor Tax Law, entitling them, in the first instance, to a liquor tax certificate. The applications, bonds and the amount of the tax required to be paid, were duly and regularly presented, in form at least, to the respondent, William H. Foster, the treasurer of Cortland county, and he certifies that all of the steps and proceedings, necessary to be taken on the part of said petitioners, upon said several applications, were filed with him; and the money tax required by law was duly tendered to him and that he refused to accept the same. He also certifies in his returns, made to this court upon said proceedings, that he informed said petitioners that he could not issue said liquor tax certificates; and then and there indorsed upon said petitions a statement of his reasons for declining to issue said liquor tax certificates.

The respondent's returns to this court in said several proceedings also show the grounds upon which he refused to comply with said applications. (It is evident that the date in said returns, March 22, 1899, should correspond with the date of filing the town clerk's statement, which was February 22, 1899, and is a clerical error. The original of said statement is returned to me with said proceedings.) Among other things which he gives as a reason for rejecting said applications and refusing to issue certificates is that the town clerk of the town of Cortlandville, in the county of Cortland, on or about the 22d day of February, 1899, filed with him a certificate or statement as follows:

"County of Cortland. Statement of vote of the town of Cortlandville on question of 'Local Option' at Annual Town meeting held in the said Town, February 21st, 1899. Question

No. 1—Number voting 'Yes,' 907; 'No,' 1495; 'Blank,' 272.
Question No. 2.—Number voting 'Yes,' 816; 'No,' 1444; 'Blank,' 414. Question No. 3—Number voting 'Yes,' 1274; 'No,' 1043; 'Blank,' 345. Question No. 4.—Number voting 'Yes,' 1155; 'No,' 1342; 'Blank,' 177.

Dated,

“(Signed.) H. H. PUDNEY,
“Town Clerk.”

Indorsed on the back, “Filed Feb. 22, '99. W. H. Foster, Co. Treas.” Also stamped on the back of said statement are the printed words: “State of New York. Received Apr. 29, 1899, Department of Excise.”

The verified returns by the respondent also show that by a majority vote of the legal voters of the town of Cortlandville, upon questions 1, 2 and 4, said voters determined that no liquors should be sold, or liquor tax certificates should be issued by said respondent in said town; and that, therefore, the respondent had no right or authority to receive said several sums of liquor tax money so offered and tendered to him and issue said liquor tax certificates prayed for; none of said applications having been made for liquor tax licenses under Question No. 3.

The petitioners claim that the respondent is not justified in withholding said liquor tax certificates for the reason that the town clerk of the town of Cortlandville failed and neglected to file a certified copy of the statement of the result of said town meeting on the question of “local option”; that, under said Liquor Tax Law, the petitioners were entitled to said certificates as matter of law, the county treasurer not having before him any legal evidence that the voters of said town had determined the question of “local option” against the issuing of liquor tax certificates. *People ex rel. Richardson v. Sackett*, 17 Misc. Rep. 405; *People ex rel. Thomas v. Sackett*, 15 App. Div. 290.

The question to be examined here is not quite novel, but it has never been absolutely settled by any decision of the Appellate courts of this State; as to the form of said certificate or what it shall fully contain. In two proceedings to which the attention of this court has been called, Mr. Justice Werner and County Judge Sutherland passed upon cases similar to the cases at bar; and, while granting the petitions in those cases, criticised the form of the town clerk's certificate therein, but granted the relief prayed for unless a new certificate should be filed within five

days; ordering that upon the filing of said certificate by the town clerk the petitioner's application for a liquor tax certificate should be denied.

I prefer, however, to meet this question as it has been presented, upon the form of the certificate made by the town clerk of Cortlandville, and filed with the respondent as treasurer of the county of Cortland, and the proceedings thereunder. While the Liquor Tax Law provides for the making and filing of a certificate by the town clerk, showing what has been done at the town meeting, that law does not prescribe the form of the certificate.

Subdivision 4, section 16 of said Act provides: "A certified copy of the statement of the result of the vote, upon each of such questions submitted, shall immediately after such submission thereof be filed by the town clerk or other officer with whom the returns of town meetings are required to be filed by the election law, with the county treasurer of the county," etc. It will be seen therefore that the certificate must be a copy of the statement of the result of the vote upon each of the four questions submitted.

It is a well-known rule of interpretation that where the form of the certificate is not prescribed in the act, it must be of such a nature as that it will substantially apprise the person, to whom it is to be delivered, of the facts sought to be brought to his notice and upon which he is required to act. *People ex rel. Richardson v. Sackett*, 17 Misc. Rep. 405; *Sprague v. City of Rochester*, 159 N. Y. 20, at page 26.

Laws 1896, chapter 112, section 16, subdivision 4, also declares: "It is further provided that in any town in which at the time this act shall become a law there is no license, it shall not be lawful for the county treasurer * * * to issue any liquor tax certificate provided for by this act, until such town shall have voted upon the questions provided to be submitted by this section, and then to issue such liquor tax certificate only, as may be in accordance with the vote of a majority of the electors on the questions submitted, but not before the first day of May next following said vote."

The county treasurer is without authority to issue certificates in such towns even though the applications made therefor seem to be correct in form. *People ex rel. Thomas v. Sackett*, 15 App Div. 290; rev'g S. C., 17 Misc. Rep. 406; *People ex rel. Richardson*

v. Sackett, 17 Misc. Rep. 405; *People ex rel. Fisher v. Hasbrouck*, 21 Misc. Rep. 188.

In the cases at bar there was an effort made, on the part of the town clerk, to comply with said act and to inform said respondent, whose business it was to issue the liquor tax certificates, that a majority of the votes of the town of Cortlandville had been cast for "local option" at the last annual town meeting, against the issuing of said certificates; and unless this statement is sufficient in form to be a substantial compliance with the provisions of said act, there is no evidence before this court to show that the county treasurer had any right to issue said liquor tax certificates, for the reason that there was no evidence before the respondent showing whether the voters had declared for or against the granting of liquor tax certificates; there being no evidence before me, as shown by the moving and answering papers, that this section had ever been previously complied with by a submission to the voters. In *re Wilber v. Welling, Bennett & Jackson, Stover, J.*, Washington county, not reported; see authorities under section 16, recent Liquor Tax Law, Anno.

In the cases at bar it is clear that the respondent understood the statement-certificate made and filed, and was prepared to act upon that certificate. He was apprised, — First, that this is a statement of the vote of the town of Cortlandville on the question of local option at the annual town meeting held in said town February 21, 1899. Second, that on each of the questions submitted, the clerk had copied and summarized the votes in favor of granting liquor tax certificates and those against, — using the same method and making the summary to each of the four questions submitted, — signing the same in his official capacity, as town clerk.

Upon the face of the statement thus certified the respondent was informed that he had no right or power to issue the certificates prayed for by the petitioners. With this knowledge he determined that a liquor tax certificate could not be issued. Has the court any right to compel him to determine otherwise? *People ex rel. Harris v. Commissioners*, 149 N. Y. 26; *People ex rel. Fisher v. Hasbrouck*, 21 Misc. Rep. 188.

Having information of the fact that no license had been voted, was not the respondent bound by the declaration and filing of the public official record, when filed by the town clerk in the proper

office? Liquor Tax Law, § 15; Election Law, § 113; Town Law, 1890, chap. 569, § 83.

Having knowledge of the decision made by the vote, was it necessary to file the certificate in the precise form suggested by the act? *People ex rel. Platt v. Rice*, 144 N. Y. 249; Election Law, § 111; Laws 1899, chap. 168, § 37.

The respondent cannot be compelled to do an act which he is not authorized to do. *People ex rel. Thomas v. Sackett*, 15 App. Div. 294.

The statement as signed by the town clerk was duly filed with the respondent the day following the town meeting and before the applications of the petitioners were presented to him for action.

In looking at the statute we must see what was probably in the minds of the legislators at the time section 16 and its several subdivisions were passed. Can there be any doubt as to what was intended by the legislators in directing the making and filing of said certificate? Can there be any doubt, in a legal sense, that the sole object was that such a statement should be made, by the town clerk, as would apprise the county treasurer that the legal voters had determined that no certificates should be issued? This being the object of the section, and the statement being sufficient to inform the treasurer of that fact, would he then be justified, under the law of "local option," in overriding the will of the people and issuing a liquor tax certificate at all hazards? *Sprague v. City of Rochester*, 159 N. Y. 20.

I am forced to the conclusion that the duty of the town clerk was directory merely and that the certificate or statement, over his signature, is sufficiently definite, in form, to convey the knowledge sought to be acquired and should be declared a substantial compliance with that provision of the statute relating to the filing of the certificate. The respondent had no right to disregard such statement of the result of the town meeting, conceding it to have been only a partial compliance with the act and irregular in form. *Quære*, Can this irregularity be attacked in this proceeding? *People ex rel. Fisher v. Hasbrouck*, 21 Misc. Rep. 188; *People ex rel. Van Sickle v. Austin*, 20 App. Div. 1.

The respondent could not act judicially, nor had he the power to determine the form of such statement or information. His duties are ministerial and he must stop there. *People ex rel. Rochester Whist Club v. Hamilton*, 17 Misc. Rep. 11; *People ex rel. Hartigan v. Macy, Longley, J., Columbia county*, not

reported; *People ex rel. Action v. Corkhill, Richardson, J.*, Seneca county, not reported; *People ex rel. Anderson v. Hoag, Keogh, J.*, Westchester county; see Annotated Liquor Tax Law, under § 19.

It will be seen that the legislators must have intended that this provision of the law should be met by a substantial statement of the facts sought to be known. They have fixed the form of the liquor tax certificate, in the act itself, and if the legislators had designed that any particular form should be used in notifying the county treasurer that the people had determined that no liquor tax certificate should be issued, they would undoubtedly have provided the form and furnished blanks of a particular character, as provided for by section 15 of said act.

I cannot agree with Mr. Justice Werner (27 Misc. Rep. 366) and Judge Sutherland (27 Misc. Rep. 308) that the town clerk's statement and certificate must conform to that prescribed by section 111 of the Election Law. That certificate is designed for an entirely different purpose, it is to be used in the canvass of the vote to be declared by the board of canvassers. *People ex rel. Derby v. Rice*, 129 N. Y. 461; *Matter of Stewart*, 155 id. 545.

The form of that statement and certificate is prescribed by section 84 of the Election Law of 1896.

I think it must, therefore, be held that the statement over the signature of the town clerk is a certified copy of the statement of the result of the vote upon each of the questions submitted, and is a fair compliance with the law under subdivision 4, section 16 of said act.

"Certify" is defined by the Standard Dictionary as follows: "To give certain knowledge or information of; make evident; vouch for the truth of; attest. 2. To make statement to as matter of fact. 3. To testify in writing; give a certificate of; make a declaration about in writing, under hand, or hand and seal. 4. To make attestation either in writing or orally as to the truth or excellence of some thing, as 'He certified to the truth of the statement.'"

"Certificate" is defined as: "A documentary declaration * * * regarding facts; * * * from the public authority as an attestation of facts contained in a public record. 2. In law: A writing so signed and authenticated as to be legal evidence." Holmes says: "Certificates are, for the most part, like ostrich eggs; the giver never knows what is hatched out of them."

Bouvier defines "Certificate" as a "Writing by which testimony is given that a fact has or has not taken place."

The first part of section 16 and subdivision 4, provide for the manner in which the votes shall be cast and counted, and the time at which the submission to the people shall be made. The presumption is that the election officers performed their duty in receiving, counting the votes cast and declaring the result of the election. A provision of the Election Law makes that declaration notice to each person whose name is on the poll-list. See § 112 Election Law (Election Code 1891, § 746); Town Law, Laws 1899, chap. 168, § 37.

The presumption is that all persons who were legal voters were duly registered within the time prescribed by law, since it is the duty of the election officers to register all persons qualified to vote, in the election district on the day of registration. Election Law, § 33, subd. 4.

Assuming that the clerk had been in sympathy with those who sought to obtain liquor tax licenses, and he had failed to file any certified statement, could he have nullified the vote of the town against license by withholding the filing of the statement provided by said act? *People ex rel Hirsh v. Wood*, 148 N. Y. 142.

In the case of *People ex rel. Leonard v. Hamilton*, 27 Misc. Rep. 308, Sutherland, J., holds that the will of the duly qualified electors of a town, as expressed in a vote on the question of "local option" under the Liquor Tax Law, should not be nullified by a mistake or omission of the town clerk, or other ministerial officer, in a matter of detail, which does not mislead the public or affect the result. *People ex rel. Hirsh v. Wood*, 148 N. Y. 142.

It is said in this last-cited case: "It is impossible to suppose that the Legislature used the word 'provided' as synonymous with 'prepared' so as to visit upon voters a forfeiture of the franchise if an official should make any departure in preparing the ballot from the strict authority conferred upon him."

The holding of the town meeting is provided for by law and was a matter of public notoriety and was an act of which the county treasurer had the right to take notice, independently of the certificate of the town clerk; and in his return to this court he, in effect, says that with the knowledge he had before him he had no right to issue the liquor tax certificates prayed for.

The respondent had no right to issue the liquor tax certificates asked for, with the statement made to him by the town clerk

unimpeached. And with the knowledge of the provisions of the law, and the majority vote of the inhabitants against the granting of such certificates, the petitioners had no legal right to make these applications. Liquor Tax Law, § 16, subd. 4.

The petitioners are prohibited from applying, when they can not, lawfully, obtain the certificates and they might be liable for a violation of this act if they did obtain an unlawful liquor tax certificate. Liquor Tax Law, § 34.

By section 38 of the Liquor Tax Law, the respondent was charged with the responsibility of obeying the voice of the legal voters, and had he, in defiance of the statement made, issued the liquor tax certificates applied for, he could have been removed from office by the governor, and the relator would also have been subject to a fine and guilty of a misdemeanor. The petitioners themselves, under section 34 of the act, strictly construed, knowing the fact that local option had been adopted, had no legal right to make the applications; and the court ought not to aid them in receiving that which is unlawful and which the county treasurer had no right to grant.

The respondent is by law made the custodian of the liquor tax certificates, and having no right to pass upon the form of the town clerk's certificate and statement, he could not be required, with that statement before him and the knowledge that the legal voters had rejected the granting of liquor tax certificates, to issue them to the petitioners. The court, upon a careful examination of all of the proceedings before it, finds and holds that the reasons given by the respondent for not issuing liquor tax certificates are reasonable, valid and proper; nor will this court, in the first instance, voluntarily attempt to override the privilege of the voters to pass upon this question in their own manner.

I, therefore, hold, determine and decide that the county treasurer, the respondent, was justified in refusing to grant said liquor tax certificates to the petitioners, under the concluding paragraph of section 19 of the Liquor Tax Law, under which he must issue them if at all; and that he clearly stands within the exception referred to, that "unless it shall appear by a certified copy of the statement of the result of an election held on the question of local option, pursuant to section sixteen of this act, in and for the town where the applicant proposes to traffic in liquors under the certificate applied for, that such liquor tax

certificate cannot be lawfully granted, in which case the application shall be refused."

Under this provision, with the latter portion of subdivision 4 of section 16 of the Liquor Tax Law, it seems to me it should be held to be a good, valid and sufficient reason why the relator should refuse to issue said certificates. And this court hereby determines that the respondent has given good, valid and sufficient reasons for refusing to grant the liquor tax certificates applied for by the said several petitioners, since if there is any doubt about said respondent's right to grant said certificates, the court should not exercise the discretionary power reposed in it to compel him to do so.

The proceedings must, therefore, be dismissed and the prayer of the petitioners must be denied, with only one bill of costs to the relator. (Respondent.)

Ordered accordingly.

Supreme Court, New York Special Term. Reported. N. Y. L. J. June 7, 1899.

In the Matter of the Petition of HENRY H. LYMAN to Revoke the
Liquor Tax Certificate of BERNARD LAZAROWITZ.

TRUAX, J. Motion granted with costs. The building in question is used exclusively for church purposes. (In the *Matter of ZINZOW*, 18 Misc. 653; *Peo. ex rel. Cairns v. Murray*, 148 N. Y. 171.)

The respondent was not legally trafficking at the place in question on the 23rd day of March, 1896. (*People ex rel. Cairns v. Murray*, 148 N. Y. 171; *Matter of Place*, 27 App. Div. 561; affirmed, 156 N. Y. 691.)

Supreme Court, New York Special Term. Reported. N. Y. L. J., June 7, 1899.

In the Matter of the Petition of GEORGE HILLIARD to Revoke the
Liquor Tax Certificate of HELENE KISSEL.

TRUAX, J. Motion granted on the authority of *In the Matter of Place v. Matty*, 27 App. Div. 561, affirmed, 156 N. Y. 691; *People ex rel. Cairns v. Murray*, 148 N. Y. 171.

Supreme Court, Broome Special Term, June, 1899. Unreported.

OLIN S. STUART V. THE TOWN OF NEWFIELD.

WALTER LLOYD SMITH, J. The issue here arises upon defendant's demurrer to the plaintiff's complaint. Counsel for both sides stipulate that no technical question is raised and both parties desire a determination of this question upon its merits. The action is brought practically to annul what is assumed to be the result of a vote in the Town of Newfield upon the submission of the question of license or no license. The petition asking such submission or resubmission was not filed with the town clerk twenty days before the town meeting and it is claimed, therefore, that within section 32 of the Town Law the election is void. That the submission of this question comes within that provision of the Town Law seemed to have been held in the People *ex rel. Hovey v. Town Clerk of Bainbridge*, 26 Misc. 220. The authority of this decision is not questioned by the defendant's counsel but his defense rests upon the contention that notwithstanding the improper submission, the election will be held valid because the electors of the town have fairly voted upon the question and the result as filed expresses their wishes. The defendant's contention cannot I think, be sustained. The twenty days required by law after the filing of the certificate was presumptively given to enable a full discussion and canvass of the question. The words of the statute are that no proposition shall be voted upon unless an application be duly filed at least twenty days before the election. It would be difficult to find words which would express more positively a prohibition. I am referred to no authority and I cannot conceive there can be any authority which would make valid a vote cast in the face thereof. The cases cited by the defendant's counsel are all of them cases where the ballot counted was irregular only and where no presumptive right of the electors has been violated. The irregularity of the ballot in containing names not properly placed thereupon was deemed to constitute a surplusage and the ballot was held effective for the candidates properly placed thereupon. The plaintiff is, therefore, entitled to the relief asked for.

Supreme Court, Onondaga Special Term, June, 1899. Reported. 28 Misc. 93.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JAMES HAYES, Defendant.

Grand jury—Indictment—Independent testimony as to offenses is sufficient, although the accused had, before the same grand jury, already admitted the commission of similar offenses at different dates.

Where the uncontradicted affidavit of a district attorney alleges that independent evidence was presented to a grand jury sufficient to justify the indictment of the defendant for certain illegal sales of liquor and also for keeping a disorderly house, the fact that the defendant had theretofore testified, before the same grand jury upon their inquiry into a charge made against a third person, to acts which indicated that he had, at dates other than those charged in the indictment, made illegal sales of liquor, and that he was keeping a disorderly house at a date several weeks later than the time charged in the indictment at bar, does not justify a dismissal of the indictments, as the court will presume that the grand jury have done their duty and did not permit themselves to be influenced by matters which were not properly before them.

MOTION by defendant to dismiss eight indictments found against him by a grand jury of Onondaga county, seven of said indictments charging illegal sales of liquor, and one the keeping of a disorderly house.

Nash & Lapham, for motion.

George W. Standen, opposed.

HISCOCK, J. Prior to May 16, 1899, the defendant kept a hotel in Syracuse. On May 15th, he was duly subpoenaed to appear before the grand jury as a witness against one Oliver Howard who was charged with manslaughter in causing the death of a man staying at his place. While being examined he gave evidence pertinent enough to the charge then being investigated but tending, in addition, to establish that upon May 10th he had violated the Liquor Tax Law, and also that upon that day he was maintaining a disorderly house.

The investigation of the charge upon which he was called as a witness was concluded, and after it was so concluded and a decision reached by the grand jury thereon, and upon another and subsequent day charges were presented to the same jury

against defendant upon which the indictments in question were found. The illegal sales of liquor therein charged are not at all the same ones testified to by defendant, and the indictment for keeping a disorderly house related to a date several weeks prior to the one involved in his testimony. It affirmatively appears that the evidence given by defendant was in no manner presented to or used by the grand jury in finding the indictments. So far as appears, it would have been entirely incompetent and insufficient to sustain them. There is nothing to indicate that the grand jury did not have ample evidence outside of the testimony of defendant upon which to act. Upon the other hand, there is the affidavit of the district attorney that it did have such evidence. While this affidavit is not accompanied by the testimony itself, and, therefore, is somewhat in the nature of an opinion, still it is upon a subject upon which his opinion is presumed to be valuable, and what is important is that there is nothing upon the part of the defendant tending to establish the contrary.

Under these circumstances, the defendant asks that the indictments against him shall be dismissed. He claims that his rights have been invaded in procuring these indictments from the same grand jury which had heard him give evidence which might tend to support indictments for other similar but entirely distinct offenses; that while such evidence would not be a legal basis for the indictments which have been found, nevertheless the grand jury might thereby be prejudiced against him and made more ready to decide against him upon other charges.

I do not think the motion should be granted. Upon the affidavits, I must assume that there was ample evidence to support the indictments in question outside of anything said by defendant, and that his testimony was not and could not properly be used by the grand jury in finding them. To sustain defendant's claim that his admissions have been prejudicially and improperly used against him I must assume that the grand jury in disregard of their duty have allowed themselves to be influenced by matters not properly before them. This I am not disposed to do.

It is not the duty of the court to dismiss an indictment upon proof even of the mere fact that improper evidence has been submitted to a grand jury. If the legal evidence before them was such that disregarding the improper evidence the indictment would still have been found; if the jury were not influenced to

find the indictment by the improper evidence but by the legal evidence before them, the indictment should be sustained. *People v. Molineux*, 27 Misc. Rep. 79, 81.

In this case the defendant has failed to establish any one of the necessary propositions, that there was not sufficient legal evidence; that the jury was influenced by illegal evidence, or even that illegal evidence was submitted.

Ordered accordingly.

Second Appellate Department, June, 1899. Reported. 41 App. Div. 271.

In the Matter of the Petition of HARRY W. MICHELL, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate No. 10,203, Issued to RICHARD F. JAMES, Respondent.

Liquor tax certificate—A sale of liquor upon premises, from which it has been removed by an assignee thereof, authorizes its cancellation, although it has already been transmitted to the Commissioner of Excise for surrender.

The sale of liquor by the glass by a person managing a hotel, in the absence of the proprietor, at a time when the liquor tax certificate had been removed from the premises by a person to whom the proprietor had assigned it as security for a debt, authorizes the cancellation of the certificate under subdivision 2 of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), notwithstanding the fact that six days before the sale of the liquor was made the assignee had transmitted the certificate to the State Commissioner of Excise for surrender.

When a surrender of a certificate is authorized, considered.

APPEAL by the petitioner, Harry W. Michell, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 21st day of February, 1899, denying his application for an order revoking and canceling the liquor tax certificate issued to the respondent.

Alfred R. Page, for the appellant.

Charles William Wright, for the respondent.

WILLARD BARTLETT, J.: There is no dispute as to the facts of this case, and in my opinion they entitle the petitioner to an order revoking and canceling the respondent's liquor tax certificate.

It is proved that liquor was sold by the glass at the respondent's hotel, then in charge of his brother as his agent, when the certificate was nowhere on the premises, having been removed therefrom by a brewing company to which it had been assigned by the respondent as security for a debt.

The statute requires that the "liquor tax certificate shall be posted up and at all times displayed in a conspicuous place in the room or bar where the traffic in liquors for which the tax was paid is carried on." (Chap. 112, Laws of 1896, § 21, as amd. by chap. 312, Laws of 1897.) Section 42 provides, among other things, that any person who shall violate any of the provisions of section 21 (the section above quoted, which requires the certificate to be kept displayed) shall be liable to a penalty of fifty dollars, and that if he be the holder of a liquor tax certificate, such certificate shall be forfeited. Subdivision 2 of section 28 authorizes an application to the Supreme Court by any citizen of the State for an order revoking and cancelling a liquor tax certificate "upon the ground that material statements in the application of the holder of such certificate were false, or that he was not entitled to receive, or is not entitled, on account of the violation of any provisions of this law, conviction for which would cause a forfeiture of such certificate, or for any other reason, to hold such certificate."

From these provisions, it is apparent that the respondent's failure to keep the certificate at all times displayed in the room or bar where he carried on the liquor traffic rendered the certificate liable to cancellation in a proceeding of this character. The acts of the respondent's brother, who managed his hotel in his absence, must be deemed the acts of the respondent. The certificate was taken away by a corporation which held an assignment of the instrument from the respondent. The fact that this was done in his absence or without the consent of his agent does not affect his liability. He had placed it in the power of the assignee of the certificate to take it away, and if the assignee exercised that power he must bear the consequences. The sale of liquor by the brother was carried on notwithstanding the removal of the

certificate. This was a violation of the law which subjected the certificate to forfeiture and cancellation.

Nor is it a valid objection to the maintenance of the proceeding that an application has been made (presumably by the brewing company as the assignee of the respondent) to surrender the certificate. On January 6, 1899, it was received by the State Commissioner of Excise, to whom it had been sent for surrender. The sale of liquor at the respondent's hotel occurred on January 12, 1899. Section 25 of the Liquor Tax Law, which relates to the surrender of certificates and the payment of rebates, provides in substance that if within thirty days from the receipt of the certificate by the State Commissioner of Excise, proceedings shall be instituted for its cancellation, the application in reference to its surrender shall not be granted until the final determination of the proceedings, and if the proceedings are determined adversely to the person defending the same, the certificate shall be canceled and all rebate thereon forfeited. This proceeding was instituted within the prescribed thirty days, and was, therefore, maintainable, notwithstanding the transmission of the certificate to the State Commissioner of Excise for surrender.

It is to be noted that the only persons or corporations possessing the privilege of such surrender under the Liquor Tax Law, are persons and corporations holding certificates and authorized to sell liquors under the provisions of the act, who shall voluntarily cease to traffic in liquors during the term for which the tax has been paid. It would seem, therefore, that no valid application to surrender the certificate could have been made in the case at bar by the brewing company except in the name or in behalf of the respondent to whom the certificate had been issued, and the respondent was not entitled to surrender it because he had not ceased to carry on the liquor traffic. On the contrary, he insisted upon his right to continue it, notwithstanding that the brewing company had removed his certificate. The assignment was merely as security for an indebtedness, and conveyed to the assignee no right to engage in the liquor business; so that the brewing company did not become a holder thereof authorized to sell liquors. Hence, it acquired no right to surrender the certificate except as the representative of the assignor, and in case the assignor had abandoned liquor selling. The brewing company took the certificate subject to the conditions under which the respondent held it, and the brewing company's right

to have the surrender accepted and to receive the rebate was conditional upon the lapse of thirty days without any violation of the Liquor Tax Law by their assignor. (*People ex rel. Miller v. Lyman*, 156 N. Y. 407. See, also the opinion of CHESTER, J., at Special Term, *Matter of Lyman*, 56 N. Y. Supp. 1020.)

It may be said that this construction of the law renders the assignee liable to be deprived of the security for his debt by the misconduct of his debtor subsequent to the transfer. That result, however, is due to the infirmity which the Legislature has attached to such property right as is represented by a liquor tax certificate. It is an infirmity which the courts have no power to cure.

The order appealed from should be reversed.

All concurred.

Order reversed, with ten dollars costs and disbursements, and application granted, with ten dollars costs.

Fourth Appellate Department, June, 1899. Reported. 41 App. Div. 625.

In the Matter of the Application of HARVEY F. REMINGTON, Respondent, for an Order Revoking and Cancelling Liquor Tax Certificate No. 13,136, Granted to GEORGE E. WEILAND, Appellant.

APPEAL from an order revoking and cancelling liquor tax certificate granted on petition in proceedings brought under subdivision 2 of section 28 of the Liquor Tax Law. Defendant Weiland admitted facts alleged in petition, but denied power of court to revoke.

H. C. Spurr, attorney for respondent, Remington.

To confine the penalties prescribed in subdivision 2 of section 34 to actual sales of liquor and not to violations of subdivision "h" of section 31, as well as to other subdivisions of that section, would render the remedial machinery of the law practically useless. A remedial statute should be construed to meet the object for which it was intended. (Sedgwick on the construction of

statute, second edition, page 308.) The intention of the Legislature was to control, restrict and regulate the traffic. (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 378.)

No jurisdiction was conferred upon Courts of Special Sessions in the Liquor Tax Law of 1896. It was, therefore, at that time, the plain intent of the Legislature to include in the penalty prescribed in subdivision 2 of section 34 of that act, violations of subdivision "h" of section 31. In amending the law said subdivision 2 of section 34 and subdivision "h" of section 31 remain unchanged so far as they apply to this case. The Legislature could not have intended to provide that if a certificate-holder *exposed* for sale or *gave* away liquors on Sunday, a Court of Special Sessions would have jurisdiction of the case; and that if he *sold* the liquors, jurisdiction would lie in a Court of Record.

The rule that penal statutes are to be strictly construed, yields to the paramount rule "that every statute is to be expounded according to the intent of them that made it." (Endlich on Interpretation of Statute, § 339; *Wilkinson v. Leland*, 2 Peters, 662. The primary object of all rules of interpreting statutes is to ascertain the legislative intent. (Bishop on Statutory Crimes, § 70; *Riggs v. Palmer*, 115 N. Y. 506; *People ex rel. Einsfeld v. Murray*, 149 N. Y. 378; *People ex rel. Bagley v. Hamilton*, 25 App. Div. p. 430.)

For the purpose of ascertaining the intention of the Legislature, it is necessary to resort to the whole scheme as indicated by the act itself, the condition of the times and the various sections. (*Matter of Breslin*, 45 Hun, 210.) The whole act ought to be examined. (Bishop on Statutory Crimes, § 82.)

A certificate must be revoked and cancelled for any violation of the Liquor Tax Law, conviction for which would cause a forfeiture and may be revoked for any other reason the court may deem sufficient. Subdivision 2, section 28, Liquor Tax Law. The maintenance of stalls contrary to provisions of subdivision "h" of section 31 is sufficient ground for revoking certificate. (*Matter of Bradley v. Hall*, 22 Misc. 301.) Failure to post a liquor tax certificate held sufficient ground for revocation. (*Matter of Lyman v. Fagan*, 26 Misc. 300.)

Tuttle & Hallock, attorneys for appellant.

The petition is made solely on "information and belief" and proves nothing. (*R. W. & O. R. R. v. City of Rochester*, 10 State

Rep. 809; *Mowry v. Sanborn*, 65 N. Y. 584.) The order canceling the liquor tax certificate was unauthorized. (*In re Lyman*, 57 N. Y. Supp. 888.) The Liquor Tax Law is a statute complete within itself and the penalties therein provided are exclusive. (*People v. Kinney*, 24 App. Div. 309; *People v. Stock*, 26 App. Div. 564.) The mere fact that the curtains were drawn does not constitute a crime. It is a wilful violation of the act only that warrants a conviction for the alleged offense. (*People v. Owens*, 148 N. Y. 648.)

The offense charged is one of which a Court of Special Sessions has exclusive jurisdiction under subdivision 2 of section 35 of the Act.

The offense charged is not one, conviction for which would cause a forfeiture of the certificate under section 34, subdivision 2, and consequently not one for which a certificate may be revoked under section 28.

Order affirmed, with ten dollars costs and disbursements.

All concurred, NASH, J., not sitting.

Fourth Appellate Department, June, 1899. Reported. 42 App. Div. 212.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN LEONARD,
Appellant, v. JOHN B. HAMILTON, as County Treasurer of
Monroe County, Respondent.

Intoxicating liquor—Form of “a certified copy of the statement of the result of a vote” required to be filed with the county treasurer—
Proper action of the court where an insufficient statement is filed.

On an application for a liquor tax certificate, authorizing the applicant to traffic in liquor in a town, the electors of which had voted at the last town meeting upon the questions submitted to them under the Liquor Tax Law (Laws of 1896, chap. 112), it appeared that a statement of the result of the town meeting, filed with the county treasurer, pursuant to section 16 of the Liquor Tax Law, unmistakably apprised him of the result of the meeting, which was adverse to the traffic, and stated the precise vote for and against each proposition, but that it was not technically or strictly “a certified copy of the statement of the result of the vote,” as required by that section. The court thereupon made an

order directing the granting of the certificate, unless a certified copy of the statement of the result of the vote should be filed, showing that it would be improper to grant the certificate.

Upon an appeal by the applicant from this order, it was

Held, that the order appealed from was entirely fair to the applicant, and that it should be affirmed;

That the court would not aid the applicant in his evident purpose to obtain a liquor tax certificate in defiance of the will of the electors;

The test of the right to a liquor tax certificate, under such circumstances, is the vote cast at the meeting, and not the statement of the result of the vote furnished to the county treasurer.

APPEAL by the relator, John Leonard, from an order of the county judge of Monroe county, bearing date April 20, 1899, directing the county treasurer of that county to issue to the relator a liquor tax certificate, unless within five days the town clerk of the town of Ogden should file with the county treasurer a certified copy of the statement of the result of the election in said town, "pursuant to section 16 of the Liquor Tax Law, from which it shall appear that said Liquor Tax certificate cannot lawfully be granted, in which event the application shall be and is refused and the writ of certiorari quashed, without costs."

The relator is a resident of the town of Ogden, in said county, and for several years prior to the commencement of this proceeding had been the owner of "Cottage Hotel," in said town, and engaged therein in the traffic of intoxicating liquors in pursuance of a license duly issued to him. After the regular town meeting, held in said town in the month of March, 1899, the town clerk, on the fourteenth day of March, filed with the treasurer of said county a statement, signed by him, of which the following is a copy, viz.:

"County of Monroe. — Statement of the vote of the Town of Ogden on questions submitted on local option at the annual Town Meeting, held in said town March 7th, 1899.

"Question Number '1' No. voting, yes, 250; No, 328.

"Question Number '2' No. voting yes, 218; No, 314.

"Question Number '3' No. voting yes, 351; No, 185.

"Question Number '4' No. voting yes, 260; No, 305.

"F. H. DEWEY, *Town Clerk.*"

On the twenty-fourth day of March the relator applied to the county treasurer for the certificate authorized by the Liquor Tax Law, tendering the sum required by statute therefor and present-

ing the necessary bond. The treasurer refused to issue the certificate on the ground that the statement aforesaid had been filed with him apprising him that a majority of the qualified electors of the town of Ogden had voted against the granting thereof, and he indorsed upon the application of relator a copy of such statement. The relator thereupon commenced this proceeding.

George D. Forsyth, for the appellant.

P. W. Cullinan, for the respondent.

SPRING, J. Prior to the enactment of the Liquor Tax Law the right to determine whether liquor should be sold was left, in the towns of this State, to the electors. While the vote was not directly for or against license, the issue was always clear and definite at the town meetings, and the candidates voted for were nominated as distinctively representing the approval of or opposition to the granting of licenses. In practical effect local option prevailed. This submission to the will of the electors of this question was recognized as of vital importance in the towns, and had been in vogue for many years. When the Liquor Tax Law was enacted this principle was embodied in it as one of its salient features. The clear intention was to make the granting or withholding of certificates permitting the sale of liquor in the towns to depend upon the will of the voters, expressed upon the precise proposition submitted to them.

Section 16 of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897, prescribes the manner in which the ballots shall be prepared, and recites in detail the four propositions to be determined by the electors, the fourth of which relates solely to the selling of liquors by hotelkeepers. Subdivision 4 of that section provides: "A return of the votes so cast and counted shall be made as provided by law, and if the majority of the votes shall be in the negative on either of such questions, no corporation, association, copartnership or person shall thereafter so traffic in liquors or apply for or receive a liquor tax certificate under the subdivision or subdivisions of section eleven, upon which the majority of the votes have been cast in the negative."

By the same subdivision it is further enacted: "A certified copy of the statement of the result of the vote, upon each of such

questions submitted, shall, immediately after such submission thereof, be filed by the town clerk or other officer with whom returns of town meetings are required to be filed by the election law, with the county treasurer of the county, and with the special deputy commissioner for counties containing a city of the first class, which also contains a town, and no liquor tax certificate shall thereafter be issued by such officers to any corporation, association, copartnership or person to traffic in liquor in said town under such subdivision of section eleven of this act upon which a majority of the votes may have been cast in the negative, except as otherwise provided in this act. It is further provided that in any town in which at the time this act shall become a law there is no license, it shall not be lawful for the county treasurer, or special deputy commissioner, to issue any liquor tax certificate provided for by this act, until such town shall have voted upon the questions provided to be submitted by this section, and then to issue such liquor tax certificate only as may be in accordance with the vote of a majority of the electors on the question submitted."

Section 19 of the same act requires the treasurer, after the payment of the tax and filing the necessary bond, to issue the certificate unless a certified copy of the statement of the result "pursuant to section sixteen" has been filed with him showing the vote was against the issuing of the liquor tax certificate.

In section 31 there is a grouping together of the various acts constituting illegal sales of liquor under the Liquor Tax Law, and in the category is subdivision "J," which reads as follows, viz.: "To sell liquor in any quantity in a town in which a liquor tax certificate is prohibited under subdivisions one, two and four of section sixteen of this act, as the result of a vote upon 'questions submitted.' * * *"

It is patent that the test of the right to a liquor tax certificate, carrying with it the privilege of selling intoxicating liquors, does not rest with any officer, judicial or ministerial, but with the electors of the town. Their vote is to determine that question. After the vote has been cast, then the act provides the manner in which the result of the vote shall be imparted to the executive officer who is to make effective the will of the majority as registered in the ballot box. The act requires the town clerk to make a statement of the result of the vote to the county treasurer. This is not for the purpose of furnishing evidence for use in the

courts; it is to advise the treasurer of the result of the vote. If the return made is false, the remedies for its correction are ample, as the courts are swift to undo any inadvertence or corrupt error which tends to override the will of the majority as expressed lawfully at an election. But if the return contains the requisite information enabling the treasurer to act, then that must be his guide.

The statement made by the town clerk of the result of this town meeting unmistakably apprised the treasurer that at a town meeting held on the seventh day of March, the majority of the votes cast on question 4 was decisively against the question submitted, giving the precise vote for and against the proposition. While the statement so made is not technically and strictly a "certified copy" of the return of the town meeting, in literal detail, it serves the purpose of acquainting the treasurer of the result of the vote and is adequate justification for his action. If the return is truthful in the vital part, that is, if the statement of the result of the town meeting is correct, then it should be upheld. As was said in *People ex rel. Hirsh v. Wood* (148 N. Y. 147): "The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them."

The contention of counsel, for the relator, that this statement should have all the verity of a certified copy to be admissible in evidence, is not a fair test of its import.

The right to sell liquors depends upon the vote, not upon the statement. The statement is the means provided in the act to get the information of the result of the action of the electors to the officer who is to make effective their intent. Presumptively the statement is correct and he must be governed by it. (*People ex rel. Young v. Straight*, 128 N. Y. 545; *People ex rel. Russell v. Canvassers of Albany County*, 20 Abb. N. C. 19.) If the election is held to be invalid, then that decision, *ipso facto*, annuls the certificate, however literally it complied with every formal requirement of the statute. Irregularities in the statement will not be invoked to defeat the will of the electors. This in no particular infringes upon the right of every interested party to test the validity of the election, and the existence of this right, irrespective of the statement, shows that the latter can not be made paramount to the intention of the electors.

The detailed return of the town meeting filed with the town

clerk contains much of no significance to this question. It could give no aid to the county treasurer. If votes have been improperly counted or excluded it is no concern of that official. He can not pass upon the conduct of the inspectors. His sole guide is the result of the vote upon the specific questions submitted pursuant to this act. The complete return filed with the town clerk is accessible to every one, and if the election is to be impeached, that return, not the statement with the treasurer, is the foundation for it if any inspection is desired.

In this proceeding the county judge has shown the utmost lenity to the relator. The petition contains averments challenging the validity of the election. With this the treasurer has nothing to do, and in his return to the writ he set forth the filing of the statement of the result of the vote advising him it was adverse to the issuing of the certificate permitting the sale of intoxicating liquors. The legal sufficiency of this document was the only question submitted to the county judge. He reached the conclusion that this was inadequate, but, realizing the importance of carrying out the will of the electors, he provided that the liquor tax certificate should issue unless the town clerk within five days filed with the county treasurer the certified statement prescribed by section 16 of the Liquor Tax Law, and if that showed that the liquor tax certificate could not be legally granted, it should be withheld. This was entirely fair to the relator and made the issuing of the certificate to depend where the law intended it, upon the expressed will of the electors.

The relator, although he had assailed the validity of the election, instead of accepting the provision which provided for the certified copy conforming to the technical strictness insisted upon by him, appealed from the order. The obvious purpose of the relator is to obtain a certificate in defiance of the will of the electors, and the courts will be loath to aid him in this endeavor.

The order of the county judge is affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Fourth Appellate Department, June, 1899. Reported. 42 App. Div. 624.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HEMAN J. REDFIELD, Appellant, v. FOSTER W. WALKER, as County Treasurer of Livingston County, Respondent.

This is an appeal from an order made upon the return of a writ of certiorari to review the action of the county treasurer in refusing to issue a liquor tax certificate. The town clerk of Livonia filed with the treasurer an unverified statement of the result on the local option vote in his town, and it was upon this statement, so filed, that the county treasurer refused to issue certificate. The opinion of the Special Term in this case is reported as *People ex rel. Clint v. Hamilton*, 27 Misc. 360.

Forsyth Bros., attorneys for appellant.

The county treasurer was a ministerial officer and as such had no right to exercise discretionary power. (*People ex rel. Belden*, 28 App. Div. 140.) Being a ministerial officer he could take into consideration no evidence or notification other than that which the statute provides. (*People ex rel. Darby v. Rice*, 129 N. Y. 466, 467.)

The court below erred in stating that the election of the town had legally and properly declared against the sale of liquors therein, because there is no evidence before him that any election at all was held. The certificate or statement of the town clerk is no evidence of it. (Section 922 of the Code of Civil Procedure; *Water Commissioners v. Lansing*, 45 N. Y. 16; *Wolff v. Washburn*, 6 Cow. 261; *Anderson v. James*, 4 Robt. 35; *Parr v. Village of Greenbush*, 72 N. Y. 469; *Triplet v. The Mayor*, 125 N. Y. 617.)

P. W. Cullinan, attorney for respondent.

The orders appealed from should be affirmed on the authority of *People ex rel. Leonard v. Hamilton*, 42 App. Div. 212.

Order affirmed, with ten dollars costs and disbursements.

All concurred.

Fourth Appellate Department, June, 1899. Reported. 42 App. Div. 624.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Plaintiff, *v.* ERNEST BRUCKER AND ANOTHER, Defendants.

Defendant's exceptions overruled and motion for a new trial denied, with costs, and judgment ordered for the plaintiff on the verdict, with costs.

All concurred, ADAMS, J., not voting.

Court of Appeals. Reported. 159 N. Y. 561.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* JOHN C. MCGRIEVEY, Respondent.

Lyman v. McGrievey, 25 App. Div. 68, affirmed.
(Submitted, May 11, 1899; decided June 13, 1899.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 21, 1898, upon an order affirming a judgment in favor of defendant entered upon a decision of the court dismissing the complaint on trial at Special Term.

M. Nussbaum, for appellant.

Thomas O'Connor, for respondent.

Judgment and order affirmed, with costs, on the first ground stated in opinion below.

All concur.

Supreme Court, Fulton Special Term, July, 1899. Reported. 28 Misc. 278.

Matter of the Application of HENRY H. LYMAN, State Commissioner of Excise, for an Order Cancelling and Revoking Liquor Tax Certificate No. 28,190, Issued to JESSE O. WELLS.

Liquor Tax Law—Bad faith of applicant in applying when he knew his town had voted against local option.

When an applicant for a liquor tax certificate fails to answer the question, contained in his application, whether he could legally traffic in liquors in the place in question, because he then knew that his town had voted at town meeting against local option, he is chargeable with bad faith in making his application and his certificate will be revoked at the instance of the State Commissioner of Excise.

APPLICATION under the Liquor Tax Law to revoke and cancel a liquor tax certificate.

W. E. Schenck, for applicant.

John M. Kellogg, for respondent.

STOVER, J.: This is a special proceeding under section 28 of the Liquor Tax Law, to revoke a certificate granted by the county treasurer.

At the annual town meeting, held in the town of Louisville, St. Lawrence county, on the 14th day of February, the electors of the town voted upon the four local option questions submitted to them under the provisions of the Liquor Tax Law, and a majority of the votes cast upon each of the propositions was in the negative, and the result was announced at the close of such town meeting.

It appears by the moving papers that on or about the 15th day of February, a duplicate statement of the result was made, and on or before the first day of May, such statement was filed, one in the office of the county treasurer of St. Lawrence county, and the other mailed to the office of the excise department. The allegation of the county treasurer is that the notice had never been *served* on him, and that at the time the certificate was issued, he had no knowledge that the town had taken any action at the February meeting.

In the application made by the respondent herein, the question as to whether he could legally traffic in liquors at this place is

not answered, and upon the argument of the motion it is stated that he at that time knew of the action of the town meeting, but relied upon the fact that he had received the blanks some time before from the county treasurer, and the advice of a justice of the peace that he could get the certificate.

I am forced to the conclusion that at the time the application was made, the applicant knew of the action of the town meeting, and that he could not legally carry on the traffic at the place specified in his application, and that the reason he failed to answer such question was because of such knowledge on his part. The question, therefore, of the good faith of the applicant, must be held against him.

The question as to whether the business may be carried on in a town where no license has been voted for by the people, is not dependent upon the act of the clerk, nor can the good faith of the county treasurer in issuing a certificate protect an applicant. I know of no way that the court, upon such an application as this, can undertake to protect an applicant against the consequences of an application, which he knew was unauthorized when he made it. To refuse the application to cancel the certificate, it seems to me would be a plain violation of duty. If the consequence of the cancellation of the certificate is the loss of the fees paid, it is a loss due entirely to the action of the applicant himself, and one which he must bear.

The application must be granted, but, under the circumstances, without costs.

Application granted, without costs.

Supreme Court, New York Special Term, July, 1899. Reported. 28 Misc. 336.

Matter of the Petition of LEVI L. KESSLER to Cancel Liquor Tax Certificate Issued to PATRICK CASHIN.

Liquor Tax Law—Exemption from consents lost by a cessation of traffic through a fire.

The exemption from procuring the consents of property holders, granted by the Liquor Tax Law to a place used on March 23, 1896, for such traffic and in similar continuous use thereafter, is lost by a subsequent cessation of the traffic during three months which were required to put the premises in proper condition for use after their partial destruction by fire.

APPLICATION under the Liquor Tax Law for the cancellation of a liquor tax certificate.

Samuel Strasbourger, for petitioner.

C. A. Deshon, for respondent.

Julius Lehmann, for landlord.

Alfred R. Page, for Hilliard, Special Deputy Commissioner.

RUSSELL, J. The petitioner applies for cancellation of the liquor tax certificate issued to Patrick Cashin on the application made and license granted the 28th day of April, 1899, upon the ground that the statement in his application that the traffic in liquor was lawfully carried on in said premises on the 23d day of March, 1896, and such premises had been continuously occupied for such traffic ever since that date, was false in fact, and, therefore, the commissioner had no authority to issue such tax certificate. Such statement in Cashin's application was necessary because the saloon was located in a residential district. Chap. 312, Laws 1897, § 17, subd. 8.

Without the consent of at least two-thirds of the owners, or duly authorized agents, of the dwellings within two hundred feet, no saloon could be licensed to carry on the liquor traffic except where it had been used as such on the 23d of March, 1896, and continuously thereafter.

The premises, being 850 Sixth avenue, New York city, were used for the liquor traffic on the 23d day of March, 1896, and, on the 22d day of April, 1898, a new license was given to Katy E. Parks, expiring May 1, 1899, which license was transferred to Patrick Cashin, the respondent, April 20, 1899. On the date of such transfer, and at the date of obtaining the liquor tax certificate by Patrick Cashin, on the 28th of April, 1899, the premises were not used for traffic in liquor, and had not been so used for two months, nor were they so used until the 19th of May, 1899. The cause of the suspension or cessation of the liquor traffic in this saloon was the destruction of a portion of the premises by fire, in February, so that it was not practicable to use them for such purpose. The landlord at once repaired the premises, and the respondent put fixtures in the new saloon, so that the sus-

pension was but for a period of three months and the acts of the parties evidenced the continuous desire and intent to carry on the business for which the premises had been formerly used. Did such cessation of business, temporary as it was, destroy the privilege of the tenant to obtain a liquor tax certificate without the consent of the surrounding owners of dwellings, or was his right simply suspended from necessity?

The aim of the present Liquor Tax Law is to forbid traffic in liquor within two hundred feet of a church or schoolhouse (§ 24, subd. 2); and also to free from such traffic residential districts unless the consents of the owners of dwellings, within two hundred feet, of at least two-thirds of the total number, shall be obtained, indicating a willingness of the people contiguous to the saloon that such business shall be carried on (§ 17, subd. 8). An exception to the last inhibition, however, is made where the business has been continuously carried on since the 23d of March, 1896, for the obvious reason that some protection should be given to vested rights, and that even the business of selling liquor should not be prohibited to the destruction of the good-will and property existing prior to the passage of the Liquor Tax Law. People ex rel. Bagley v. Hamilton, 25 App. Div. 428; Matter of Lyman, 34 App. Div. 390; People ex rel. Sweeney v. Lammerts, 18 Misc. Rep. 343; People ex rel. Cairns v. Murray, 148 N. Y. 172.

This object is largely destroyed where a cessation of the business, either voluntary or involuntary, occurs. If voluntary, the occupant thus signifies his intent to engage in some other business, or his belief that the privilege is not of much value to him at the place in question. If involuntary, as in the case at bar, the termination of license privileges without the consent of dwelling owners may be a portion of the hardship; the property is destroyed and the good-will largely lost, so that the protection of the exception in favor of antecedent and continuous business mainly passes away. The statute does not designate the location as a privileged one carrying a franchise to vend liquor perpetually; it merely aims to prevent loss to property in consequence of the advent of a new statute. And when that aim has been accomplished, and the conditions become mainly as in other cases, the location of the former saloon falls into the general classification applying to all saloons within residential districts, or within two hundred feet of a schoolhouse or church. The landlord and tenant here had to create new property, and,

virtually, a new saloon; it will not answer in such case to say that a new saloon may be erected on the ruins of the old, and carry with it the easement or franchise of a right to vend liquor in perpetuity. Nor will it do to say that this special exemption from a general policy is a vendible right, as in the present case, passing from Duffy to Parks and from Parks to Cashin, so that it attaches to the election of Cashin to again lease the premises destroyed by fire upon the landlord's renewing the building for such occupancy, and the tenant putting in the appurtenances for a new saloon.

The objection that Kessler is not a resident of the contiguous district and has no apparent pecuniary interest is not well founded. Any citizen of the State may apply for a revocation or cancellation of the certificate (§ 28, subd. 2).

Let the prayer of the petition be granted.

Petition granted.

Supreme Court, Kings Special Term, July, 1899. Reported. 28 Misc. 385.

Matter of the Petition of HENRY H. LYMAN for an Order Revoking, and Cancelling Liquor Tax Certificate No. 10,551, Issued to EDWARD MALONEY.

Liquor Tax Law—Adjournment of proceeding to vacate certificate.

Where an order to show cause why a liquor tax certificate should not be revoked, made returnable in not more than ten days from the granting thereof, has been served on all the parties except the certificate holder, the court has power, as to the parties served, to extend the return day and adjourn the proceeding until then, not exceeding, it seems, ten days.

PROCEEDINGS under the Liquor Tax Law to cancel a liquor tax certificate.

Alfred R. Page, for petitioner.

Pink & Caldwell, for respondent.

MADDOX, J.: The order of December 27, 1898, required the persons and corporation therein named to show cause on January 6, 1899, why an order should not be made revoking the liquor tax

certificate described therein, and service having been duly made on Michell and the Congress Brewing Company prior to such return day, but not on Maloney, the proceeding was, as to Michell and said Company, on such return day adjourned to January 16th, and an order made "that the return day of the annexed order (of December 27th) be extended to January 16th, 1899, at the same time and place as therein specified and that the said Edward Maloney be required on such date to show cause why the relief therein demanded should not be granted."

The return day of the order of December 27th "was not more than ten days from the granting thereof" (Laws of 1896, chap. 112, § 28), nor was the return day of the order of January 6th. Having jurisdiction of all but Maloney, the court, as to those served, had power to adjourn the proceeding. Indeed, no objection was made by the counsel for the Brewing Company, who was then present.

The order granted on January 6th was made upon the petition and all the papers used on the application, and required Maloney to show cause on such date, the adjourned day, January 16th, why the relief demanded should not be granted. *Matter of Moser v. Scheib*, 16 App. Div. 379, is very different from this case; for the return day was fifteen days after the granting of the order. There is no merit in the objection. The motion is granted.

Motion granted.

Supreme Court, Queens Special Term, July, 1899. Unreported.

In the Matter of the Application of ANNIE FLANAGAN to Revoke the Liquor Tax Certificate of JAMES HARRIS.

GARRETSON, J.: The respondent must be held to the statements made by him in his application for the liquor tax certificate particularly as to the situation of the premises and the specific location of the bar, or place thereon, where liquor was intended to be sold. Reading these in the light of the testimony the conclusion is irresistible, that when he verified the application and obtained the consents, it was his purpose to conduct the business in the front room, ground floor, of the dwelling house. That the

removal of the small addition from the dwelling house to the rear of the lot was an after-thought and was done to avoid the effect of his inability to secure the consents of two-thirds of the owners within the limit of two hundred feet from the principal entrance to the dwelling house, is clearly inferable from the testimony. The small building on the rear of the lot, considering its location, entrance and general character does not correspond in any particular to the statements made in the application. The liquor tax certificate issued to him therefore authorized the trafficking in liquors in the front room of the dwelling house only.

Within the distance of two hundred feet from this dwelling house there were nine other buildings occupied exclusively as dwellings, as to which the respondent has obtained the consents of but five of the owners, viz: Roach, O'Reilly, Sutcliffe and Ann Harris. Ellen Kelly's house is without the limit of distance and the consent of F. C. Norton can not be regarded. He was the owner and lessor of the premises where the business of trafficking in liquors was intended to be carried on, and his consent to such use is attached to the application. The consent of Ann Harris has been taken as one proper to be obtained and given although its validity is not free from question. The only satisfactory evidence of ownership of the property as to which she consents as owner is a deed which vests the title in her and the respondent, as wife and husband and as tenants of the entirety. The validity of this consent having been challenged upon the hearing it should have been sustained by better evidence than oral testimony that the respondent had shortly prior to the time of filing his application conveyed his interest in the property to his wife. Besides, the respondent and his wife reside upon this property, which adjoins the premises where the business was intended to be carried on.

The prayer of the petition that the liquor tax certificate issued to the respondent be revoked and cancelled for false statements in the application made by him therefore in respect to having obtained the consents of two-thirds of the owners of the buildings occupied exclusively as dwellings, the nearest entrance to which is within two hundred feet, measured in a straight line of the nearest entrance to the premises where the traffic in liquors was intended to be carried on, is granted, with thirty dollars costs, besides disbursements.

Supreme Court, New York Special Term, July, 1899. Reported. 28 Misc. 408.

Matter of the Petition of HENRY H. LYMAN for an Order Revoking
Liquor Tax Certificate No. 6,111, Issued to PATRICK MONAHAN

1. Liquor Tax Law—Costs of proceeding to vacate certificate where it
has expired.

Although a liquor tax certificate has expired by limitation, the court may award costs to the successful party where a reference has been ordered, upon an application to revoke the certificate.

2. Same—Serving a meal with a drink.

To put a sandwich beside a drink, when a sandwich was not ordered, and to take it away again without payment made therefor, is not serving, in good faith, a meal with a drink.

PROCEEDINGS under the Liquor Tax Law to revoke a liquor tax certificate.

Alfred R. Page, for petitioner.

Guggenheimer, Untermeyer & Marshall, for respondent.

TRUAX, J. It is claimed by the learned counsel for the respondent that a decision of this case is no longer necessary, because the liquor tax certificate which this proceeding is brought to have canceled expired by act of law on the 1st day of May, 1899, and that, therefore, the decision of this case would be the decision of an academic question and not of an actual litigation. There is no force in this claim. The proceeding was taken under subdivision 2 of section 28 of the Liquor Tax Law. There has been a reference in it as provided by that statute, and, under that section, costs may be awarded in favor of and against any party thereto. Among such costs would be the expenses incurred upon the reference. For this reason alone I think the relator has the right to have it determined whether he shall or shall not pay these costs. Applying the rules heretofore laid down by the courts (Matter of Zinzow, 18 Misc. Rep. 653; People ex rel. Cairns v. Murray, 148 N. Y. 171), the liquor store of which the relator complains is within two hundred feet of a building used exclusively as a school. I am also of the opinion that the respondent has violated the provisions of the Liquor Tax Law in selling

liquors on Sunday. The burden of showing that his building was a hotel and conformed to the requirements imposed by section 31 of the Liquor Tax Law was upon the respondent. Matter of Lyman, 28 App. Div. 127. The evidence shows that drinks were sold without meals. Two of the witnesses for the relator swore that they had no drinks without meals, but, taking the testimony of the waiter, who testified that he served said drinks, as true, it shows that no meals were ordered by the persons to whom the drinks were delivered, and that none were paid for by them. To put a sandwich beside a drink when a sandwich is not ordered, and to take it away again without having received pay therefor, is not serving in good faith a meal with a drink. Motion granted, with costs.

Motion granted, with costs.

Third Appellate Department, July, 1899. Reported. 42 App. Div. 335.

ALBANY BREWING COMPANY, Respondent, *v.* EDWARD L. BARCKLEY, as Treasurer of Albany County, and A. PAGE SMITH, as Receiver, etc., of JOSEPH SEENBY, Appellants.

Conversion—Surrender of a liquor tax certificate by the receiver of the holder thereof—Action for its conversion brought by an assignee of the certificate—Effect of adding the words “as Treasurer of Albany County” to the name of the county treasurer in the title of the action.

Where a liquor tax certificate is delivered to a county treasurer for surrender by the receiver, appointed in supplementary proceedings, of the holder of the certificate, who, on the face of the papers, was entitled to surrender the certificate, and the county treasurer, without notice of the claim of an assignee of the certificate, who had advanced the money with which the certificate was purchased, issues duplicate receipts; required by the Liquor Tax Law (Laws of 1896, chap. 112), and transmits the certificate to the State Commissioner of Excise, the failure of the county treasurer to deliver it upon the demand of the assignee, made after the county treasurer had parted with possession, does not establish a conversion.

The fact that in the title of an action brought for the conversion of the certificate the words “as Treasurer of Albany County” are added to the name of the defendant, the county treasurer, is not fatal to its maintenance, as the words quoted may be disregarded as descriptive merely.

APPEAL by the defendant, A. Page Smith, as receiver, etc., of Joseph Seeney, and also by Edward L. Barckley, as treasurer of Albany county, from a judgment of the County Court of Albany county in favor of the plaintiff against the defendant Edward L. Barckley, as treasurer of Albany county, for \$250, entered in the office of the clerk of the county of Albany on the 28th day of November, 1898, upon the verdict of a jury rendered by direction of the court, and also from two orders, bearing date the 16th and 19th days of November, 1898, and entered in said clerk's office, denying the separate motions of the defendants for a new trial made upon the minutes.

This action was brought to recover the value of a liquor tax certificate issued to Joseph Seeney on the 30th of April, 1897. The action was commenced on the 25th of January, 1898, Mr. Barckley, as treasurer, being then the only defendant. It was alleged in the complaint, among other things, that prior to the 1st of November, 1897, Seeney assigned to the plaintiff the said certificate and all his interest therein and empowered the plaintiff to surrender it and recover to its own use all moneys due by virtue of such surrender, and that on the first of November it was the sole owner of such certificate and rights; that prior thereto Seeney had ceased to traffic in liquors and the certificate was worth \$250; that Barckley, as treasurer, on the first of November, wrongfully and without authority of law took into his possession the said certificate without the knowledge or consent of the plaintiff and refused to deliver it to the plaintiff though possession of the same was demanded by the plaintiff, and still wrongfully retains it and refuses to pay the plaintiff its value. Judgment was demanded for \$250 and interest. The defendant Barckley, as treasurer, in his answer, among other things, denied any wrongful taking or retention of said certificate; denied any knowledge or information sufficient to form a belief as to the transfer to plaintiff or its ownership; alleged the surrender of the certificate to him by the receiver of the property of Seeney duly appointed, and the issuing by him, as county treasurer, of duplicate receipts, pursuant to the provisions of section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), and the delivery of one of such receipts to said receiver, and the transmission of the other, together with the certificate and the petition for cancellation, to the State Commissioner of Excise. It was also alleged that the receiver com-

plied with the provisions of section 25 in all matters pertaining to the surrender of the certificate, and claimed to be entitled to all moneys due by virtue of the surrender, and demands the same of the defendant, and a stay was prayed for until the receiver should be brought in as defendant. Thereafter, on April 19, 1898, by an order of the County Court, on motion of the attorney for the plaintiff, plaintiff was given leave to bring in as a party defendant the said receiver. An amended summons and complaint were accordingly served, the amended complaint being the same as the original, except that the appointment of the receiver was alleged, and it was stated that he claimed to have some interest in the cause of action set out in the complaint or in the certificate, and that such interest, if any, accrued subsequent to that of the plaintiff and was subject to its rights. The receiver in his answer claimed to have rightfully taken into his possession and surrendered the certificate in question, and received from the officer issuing the certificate the surrender statement which authorized him to receive the rebate. It was alleged that the alleged assignment to plaintiff was conditioned upon the plaintiff furnishing beer to Seeney during the time the license was operative; that the plaintiff failed to perform this condition, and, therefore, ceased to have any claim on the certificate.

Upon the trial at the close of the evidence the court directed a verdict in favor of the plaintiff against the defendant Barckley, as county treasurer of Albany county, for the sum of \$250, and declined to submit any question of fact to the jury. Exception was duly taken by the defendants.

William E. Schenck, for the appellant Barckley.

George H. Mallory, for the appellant A. Page Smith.

Robert W. Hardie, for the respondent.

MERWIN, J. On the 30th of April, 1897, the defendant Barckley, as county treasurer of Albany county, in consideration of the payment to him by Joseph Seeney of the sum of \$500, issued to Seeney a liquor tax certificate numbered 12,953, authorizing and empowering Seeney to traffic in liquors at No. 1235 Broadway in the city of Albany from April 30, 1897, to April 30, 1898, under and pursuant to subdivision 1 of section 11 of the

Liquor Tax Law (Laws of 1896, chap. 112). The money which Seeney paid was borrowed by him of the plaintiff on the 26th of April, 1897, and Seeney gave to the plaintiff his note therefor. As a part of the same transaction Seeney executed and delivered to the plaintiff an instrument in writing in which Seeney, after a recital that a liquor tax certificate was about to be issued to him, the moneys to pay for which had been advanced by plaintiff, assigned and transferred to the plaintiff "all the right, power and option which I have or which I shall hereafter have under the said tax certificate and the provisions of said statute to surrender or cancel said tax certificate or to have the said tax certificate transferred to any other premises than those above mentioned, or to sell, assign or transfer the said tax certificate, or to receive and collect the amount of any unexpired coupons on said tax certificate and any money due, or to become due, upon the surrender, transfer or cancellation of said tax certificate"; and Seeney also thereby constituted the plaintiff his attorney, irrevocable, for him and in his name to transfer to itself or to any other person the said certificate and have it transferred to any other premises and to surrender and cancel the same and to make all necessary instruments to accomplish such purposes; and in the event of such sale or surrender Seeney transferred to the plaintiff any and all moneys received or payable for such tax certificate. Seeney also agreed to deliver up the certificate to the plaintiff upon demand, and authorized the plaintiff to enter upon his premises and take away the certificate at any time.

At the time of this transaction it was understood between the plaintiff and Seeney that the plaintiff should furnish Seeney beer during the term of the license. It did so up to October 24, 1897, when it refused to furnish it longer, by reason of the failure of Seeney to make payments. In October the plaintiff recovered judgment against Seeney upon the note, and this judgment has not been paid. In the latter part of October the plaintiff demanded the certificate from Seeney, and he agreed to bring it to the plaintiff on the thirty-first of October to be surrendered.

On the 30th of October, 1897, the defendant A. Page Smith, by an order of the Albany county judge in proceedings supplementary to execution upon a judgment in favor of George W. Whitman against Seeney, was appointed receiver of the property of Seeney, and upon the same day the receiver took possession of the said certificate. Upon the first of November following, the

receiver surrendered this certificate to the county treasurer together with a verified petition in due form for its cancellation and the payment to him of the proper rebate. The treasurer thereupon gave to the receiver a receipt for the certificate and a statement of the amount of the rebate and by whom payable, and sent to the State Commissioner of Excise a duplicate of the receipt together with the certificate and the petition for cancellation.

The plaintiff claims, and at the trial gave evidence tending to show, that the treasurer or his deputy, before sending the certificate to the State Commissioner, had verbal notice from plaintiff that it claimed to own the certificate. This, however, was denied on the part of the defendants. On the 24th of November, 1897, the plaintiff served on Mr. Barckley, individually and as treasurer of Albany county, a written notice setting out its claim to the ownership and possession of the certificate and demanding the proceeds or rebate due by virtue of the surrender and cancellation. On the 25th of January, 1898, the plaintiff served a notice on Mr. Barckley, as treasurer, demanding possession of the certificate and also demanding its value, being the sum of \$250. The certificate has not been in possession of the county treasurer since November 1, 1897. The rebate has not been paid to anybody. It appears that on or about December 8, 1897, the State Commissioner sent to the office of the county treasurer orders for the payment of the rebate, payable to the receiver, but they were on the same day recalled.

The certificate in question came into the possession of Barckley, as county treasurer, on November 1, 1897. It was surrendered to him in due form by the representative of the party to whom it was issued, and a surrender statement or receipt given to the person who upon the face of the papers was entitled to it. The county treasurer prior to the surrender had no notice of the claim of plaintiff. If the county treasurer before any such notice transmitted the certificate to the State Commissioner, I fail to see upon what basis the county treasurer can be liable for its conversion. Under the statute (§ 25, as amd. by Laws of 1897, chap. 312), it was the duty of the county treasurer, upon the surrender of the certificate and the presentment of a petition in due form, to compute the amount of the rebate, execute duplicate receipts of statements in certain form, deliver one of such receipts to the person entitled to receive the rebate, and immediately transmit

the other, together with the surrendered certificate and the petition for cancellation, to the State Commissioner. If within thirty days thereafter no proceedings are instituted leading to a forfeiture of the rebate, the State Commissioner is then required to prepare two orders for the payment of the rebate, one order for the one-third thereof directed to the State Treasurer, and one order for the two-thirds thereof directed to the fiscal officer of the proper locality, in this case the city of Albany, and transmit such orders to the officer who issued the canceled certificate, to be delivered to the holder of the duplicate receipt upon the surrender of such receipt, which should be immediately transmitted to the State Commissioner. The canceled certificate is not returned to the county treasurer, nor is the money in his hands with which to pay the rebate. He is simply to deliver the orders issued by the State Commissioner.

In this view of the case, the defendant, the county treasurer, was at least entitled to go to the jury on the question whether he transmitted the certificate to the State Commissioner before he had any notice of the plaintiff's claim. If he did, he did not have it in his possession when the demand was made; he had before that time lawfully received it and lawfully parted with its possession and would not be liable for its conversion.

The plaintiff, under the power of attorney or instrument of April 26, 1897, had a right at any time to enter upon the premises of Seeney and take the tax certificate. It is evident that the instrument above referred to was given as a security for the money loaned by plaintiff to enable Seeney to obtain the license. The plaintiff, under the facts appearing in the case, as between it and the receiver, had an equitable claim upon the certificate and any rebate thereon and the receiver took subject to such claim. (*Niles v. Mathusa*, 20 App. Div. 483; *Koehler v. Flebbe*, 21 id. 210; *Matter of Jenney*, 19 Misc. Rep. 244; *affd.*, 19 App. Div. 627.) The plaintiff did not, however, take possession of the certificate as it might have done, but allowed it to remain upon the promise of Seeney to deliver it on the thirty-first of October to be then surrendered. In the meantime the receiver was appointed, took possession of the certificate and on November first surrendered it to the county treasurer in due form and demanded payment of the rebate. This was done prior to the time the agent of the plaintiff claims to have given the county treasurer notice of plaintiff's claim. The agent testifies that about noon he was at

the county treasurer's office; saw Mr. Bender, the deputy county treasurer, told him that he had learned that A. Page Smith had surrendered a liquor tax certificate issued to Seeney, and that he then told him that the plaintiff had an assignment of the license, and showed him the instrument of April 26, 1897. Mr. Bender testifies that no such occurrence took place on November first, but that it was several days afterwards and after all the papers had been transmitted to the State Commissioner. From the evidence on the part of the plaintiff it may be inferred that the surrender statement was delivered by the county treasurer to the receiver before the agent of the plaintiff saw the deputy. The plaintiff does not seem to have ever claimed that it desired to use the certificate except for the purpose of obtaining the rebate. It is not apparent that the county treasurer has ever done anything to deprive him of that right. The rebate has not been paid or the orders for that purpose delivered.

It seems to me that upon the undisputed facts in this case the county treasurer and the excise department had a right to consider the surrender of the certificate operative, and if so that the county treasurer was not liable for its conversion.

The Trial Court erred, I think, in holding that the defendant Barckley, as county treasurer or individually, was liable for the conversion of the certificate in question. It follows that a new trial should be granted.

No judgment was directed as to the defendant Smith, receiver, etc., and the judgment appealed from contains no determination as to his rights. His motion for a direction of a verdict in his favor was denied, as also his motion to dismiss the complaint. The receiver was evidently brought in as a party defendant for the purpose of having a final determination as to the ownership of the certificate or rebate. It may be that upon a new trial that purpose may be accomplished. If the pleadings need to be amended, that is a question for the court below to consider.

The plaintiff in his law action as originally commenced was, probably, not obliged to bring in other defendants. (*Chapman v. Forbes*, 123 N. Y. 532.) Having done so voluntarily, it may be that the court had the power to adjust the rights of all parties. (*Derham v. Lee*, 87 N. Y. 599.) That question, however, need not here be determined. The defendant receiver will have the benefit of the new trial where it is to be assumed all his rights will be protected.

It is urged by the defendants that the action is not maintainable because it is against Barckley "as Treasurer of Albany County." Those words may be deemed descriptive of his position, and if the cause of action alleged and proved is personal against him, they might be disregarded. (*Lehman v. Koch*, 30 N. Y. St. Repr. 224; *Berford v. Barnes*, 45 Hun, 253; *Tighe v. Pope*, 16 id. 180; 1 Ency. of Pl. & Pr. 540.) It is not apparent how the county of Albany would be bound or affected by the judgment. None of its moneys were applicable to this claim or were in the hands of the treasurer for that purpose. The action was not against the county (County Law, chap. 686, Laws of 1892, § 3), and the use of the words, "as Treasurer, etc.," is not, we think, necessarily fatal to the action.

All concurred.

Judgment and orders reversed and a new trial granted, costs to abide the event.

Supreme Court, Onondaga Special Term, July, 1899. Reported. 28 Misc. 451.

Matter of the Application of EDSON GETMAN.

1. Liquor Tax Law—Local option—All four questions must be resubmitted —Petition.

Where local option is, after the lapse of two years, again submitted under the Liquor Tax Law to a town meeting, all the four questions prescribed by the statute must be submitted to said meeting, and the necessary petition, of ten per cent of the votes cast at the last general election, must so request.

2. Same—Hotelkeeper, aggrieved by illegal resubmission, should proceed against county treasurer.

Where the town meeting votes, not only upon those two statutory questions which were embraced in the petition, but also upon the further one whether hotelkeepers of the town should be permitted to sell liquor, the latter vote is illegal; and the remedy of a hotelkeeper, who had a certificate and who is denied a new one, is not in an application for a special town meeting and a new submission to it of all the four questions, but he should treat the action of the town meeting as void and proceed by certiorari against the county treasurer for his unjustifiable refusal to issue him a further certificate.

THIS is an application by the above-named Getman for an order under section 16, Liquor Tax Law, as amended by chapter 398, Laws 1899, authorizing and directing a special town meeting in and of the town of Theresa, Jefferson county, for the purpose of having resubmitted thereto the four questions or propositions in regard to the issuing of liquor tax certificates, covered by the local option provisions of the section above referred to.

The application is based upon the complaint that said propositions were not properly submitted at the regular town meeting in February, 1899, which purported to pass upon them and adversely to the granting of the certificates.

A. L. Chapman, for motion.

J. B. Cooper, opposed.

HISCOCK, J. The petitioner is a member of a firm which owns a hotel in Theresa. At the annual town meeting held in that town in 1897, the voters, acting under the local option provisions already referred to, decided in favor of issuing liquor tax certificates to hotelkeepers and pharmacists and petitioner's firm took out and received one of the former class. He now desires to obtain another one and the county treasurer refuses to issue it to him upon the ground that at the annual town meeting, in February last, the voters decided against issuing such (or any) certificates.

Section 16 of the statute in question provided that at the annual town meetings occurring next after March 23, 1896, four questions should be submitted as follows (in the wording of the statute) :

1. Selling liquor to be drunk on the premises where sold (under the provisions of subd. 1 of § 11).
2. Selling liquors not to be drunk on the premises where sold.
3. Selling liquor as a pharmacist on a physician's prescription.
4. Selling liquor by hotelkeepers.

These four questions were submitted and, so far as appears, properly to the voters of the town of Theresa, who decided in favor of issuing certificates to hotelkeepers and pharmacists and against traffic of the kinds otherwise covered by the first two questions.

The statute provided that these questions might be voted upon

again in two years, which is what the electors purported to do in February, 1899.

But two conditions were essential to a valid submission. First, it must have been requested by the electors of the town to the number of ten per centum of the votes cast at the next preceding general election by written petition duly signed, acknowledged, etc. Second, a submission of all four questions was necessary. One or two could not be submitted without the rest.

While the statute does not provide as last stated in so many words, I think it is the clear and necessary interpretation of it. All of its provisions are worded and constructed upon that theory. The necessity of such submission of all questions is exemplified in the present case.

Voting upon question No. 1 by itself the electors might make a decision broad enough to prevent issuing of certificates to hotelkeepers, and, therefore, provision is made for submission of question No. 4, which would afford opportunity for qualifying action upon the first question against granting licenses to the extent of allowing them to hotelkeepers. And in the same way provision is expressly made for the net result which may be worked out by apparently contradictory voting upon questions Nos. 2 and 3.

The entire scheme of the statute contemplates and requires a submission of all the questions. Certainly there can be no doubt that the petition of electors prescribed by the statute was an absolutely essential prerequisite to action upon these questions by the town meeting of 1899. The town had once passed upon them in such a manner as to allow petitioner to take out a certificate for his hotel. Before another vote could be taken, which, perhaps, might deprive him of his right, it must have been requested in the manner provided. Without the necessary petition the town officers had no right to submit the questions to the town meeting, and the latter had absolutely no power or jurisdiction to pass upon them, and, perhaps, deprive persons of rights then secured to them by the statute.

There was in my judgment no such necessary petition, and the action of the town meeting in purporting to deprive petitioner of the right to take out a certificate, for the county treasurer bases his refusal to grant one solely upon that ground, was without jurisdiction and void. The petition which was presented requested "That the following questions be submitted to the electors

of said town of Theresa at the next regular annual town meeting:
* * * 'Shall any corporation, association, co-partnership or person be authorized to traffic in liquors under Subdivision One of Section Eleven of the Liquor Tax Law? Shall any corporation, association, co-partnership or person be authorized to traffic in liquors under Subdivision Two, Section Eleven of the Liquor Tax Law?' "

It will thus be observed that it did not request or provide for the submission of all of the four questions provided by the statute. What is especially important, so far as this petitioner is concerned, it did not request the submission of the fourth question provided by the statute, which gave the voters the opportunity to authorize the granting of certificates to hotels, even though they should vote in the negative upon question No. 1, which, by itself, was broad enough to cover hotelkeepers.

Notwithstanding this defective condition, the town officers prepared ballots for the submission of all four questions to the town meeting which, as above stated, voted upon them all against issuing certificates.

There was not the slightest authority for the submission of or vote upon question No. 4, because it was entirely omitted from the petition. Neither, in my judgment, was there any authority for the submission of the questions enumerated in the petition, unless accompanied by a submission of the others prescribed by the statute. Except for the provisions of the statute, there was no power in the town meeting to pass upon these questions, and a substantial compliance with those provisions was necessary to give it jurisdiction. There was not in my opinion such compliance. In addition to the matters already reviewed, it is urged that no sufficient notice of the town meeting was given, and this is probably true.

It is provided by the statute, section 16, Liquor Tax Law, that "If for any reason the four propositions provided to be submitted * * * shall not have been properly submitted, * * * such propositions shall be submitted at a special town meeting duly called," etc.

It is such special meeting that the petitioner desires, and he accompanies his request with the petition of a large proportion of the electors of the town. It is urged by the representative of the town, in opposition to granting the application substantially in accordance with the foregoing views, that a proper petition was

a jurisdictional necessity to legal action by the town meeting of February, 1899; that there was no proper petition and no jurisdiction; that the vote and action of the electors against issuing certificates such as petitioner desired was absolutely void and utterly ineffective to reverse or annul the action of the prior town meeting in favor of granting such certificates; that the provision for resubmission was not intended to cure such a jurisdictional defect as this, but that petitioner's course is to treat the action of the last town meeting as void and apply for certiorari against the county treasurer upon his refusal to issue a certificate under section 28.

I think this view is correct. Of course, if there had been some mere irregularity in the proceedings in reference to the submission, plaintiff's course would have been the proper one, for various reasons. It would have been fairly within the scope of the statute which he cites providing for resubmission, and there would have been difficulty in raising collaterally upon the application against the treasurer, questions of mere irregularity. The view urged by the town, however, and adopted by this court that the action of the town was without jurisdiction and therefore void, obviates any difficulties which might otherwise arise in the certiorari proceedings, and leaves them as the proper remedy to be pursued.

This application is therefore denied, but without costs and without prejudice to the right of petitioner to take such other proceedings for securing a certificate as he may be advised.

Application denied, without costs, and without prejudice to right of petitioner to take other proceedings.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
August 18, 1899.

In the Matter of the Petition of ADOLPH HALBRAN to Revoke a
Liquor Tax Certificate of MARGARET LENZ.

McADAM, J.: The proceeding is instituted under section 28 of chapter 112 of the Laws of 1896, as amended by section 19 of chapter 312 of the Laws of 1897. Subdivision 2 of the section

as amended provides that upon presentation of the petition for revocation and cancellation of the certificate, "the justice or court shall grant an order requiring the holder of such certificate" * * * "to appear before him or before a Special Term of the Supreme Court of the judicial district, on a day specified therein, not more than ten days after the granting hereof." Here the order was made returnable eleven days after it was granted. As the proceeding involves a forfeiture, the application is denied, without costs and with leave to renew.

Supreme Court, Monroe Special Term, August, 1899. Reported. 28 Misc. 622.

Matter of the Application of GEORGE KINZEL for an Order Revoking and Canceling Liquor Tax Certificate No. 13,865, Granted to MICHAEL MALONE.

1. Liquor Tax Law—Sale on Sunday of drinks without meals.

Where the servants of an hotelkeeper sell beer and ale, in his presence, on Sunday in the hotel dining-room to persons not guests nor customers at regular meal hours, and the servants, in some cases, thereafter place on the table of the customers sandwiches not ordered by them, and, in other cases, fail even to do that, the Liquor Tax Law has been violated and the certificate of the hotelkeeper must be canceled.

2. Same—Liability of hotelkeeper for acts of his servants.

The fact, that he had directed his servants not to sell on Sunday unless something to eat had been ordered with a drink, is not a defense to him, as he must have seen that they, while acting within the scope of their employment, were violating the statute.

APPLICATION under the Liquor Tax Law to revoke and cancel a liquor tax certificate.

H. C. Spurr, for petitioner.

Merton E. Lewis, for respondent.

DAVY, J. This is a motion to revoke and cancel a liquor tax certificate, No. 13,865, issued to Michael Malone, the keeper of a hotel at No. 93 Front street, in the city of Rochester, on the ground that said Malone, on Sunday, the 14th day of May, 1899,

permitted his servants to sell liquor to a number of persons who were not guests of the hotel.

The two principal questions in this case are, *first*, did the servants of said Malone sell liquor to persons on the Sabbath who were not guests of the hotel; *second*, were such sales made without his knowledge and consent?

It appears from the evidence that two of the petitioner's witnesses entered the dining-room of the respondent's hotel on Sunday, the fourteenth day of May last; one of them called for a glass of beer and the other called for a glass of ale. After these parties had finished drinking the ale and beer a couple of cheese sandwiches were brought from an adjoining room and placed on the table. These sandwiches were not ordered or paid for by either party. It also appears from the evidence that while these parties were in the dining-room there were two men at another table, with their hats on, drinking beer without having any kind of food before them, and there was no food on any of the tables in the dining-room. It also appears that another man came into the dining-room and called for a glass of beer, and he was informed by one of the servants that it would be necessary for him to have something to eat, and they brought him a cheese sandwich with his beer. It also appears that during this time the respondent, his wife and son were in the dining-room and must have seen all that took place.

The facts testified to by the petitioner's witnesses are not disputed by the respondent or any of his witnesses. His testimony was to the effect that he had instructed his servants not to violate the law, and to tell persons who came to the hotel on Sunday and asked for liquors that they must have something to eat with their drinks. The petitioner claims that these parties to whom liquor was sold were not guests of the hotel, and this mode of selling liquor was a violation of the Liquor Tax Law; and for such violation he seeks, under the provisions of section 31 of said act, to revoke the respondent's license.

That section provides that the holder of a liquor tax certificate under subdivision 1 of said act, who is the keeper of a hotel, may sell liquor to the guests of such hotel, except to such persons as are described in clauses 1, 2, 3, 4, 5 and 6 of section 30 of this act, with their meals or in their rooms therein, except between the hours of one o'clock and five o'clock in the morning, but not in the bar-room or other similar room in such hotel, and the term

hotel as used in this act shall mean a building regularly used and kept open as such for the feeding and lodging of guests, where all who conduct themselves properly and are able and ready to pay for their entertainment are received, if there be accommodations for them, and without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, lodgings, refreshment and such other service and attention as are necessarily incident to the use of the place as a temporary home, and in which the only other dwellers shall be the family and servants of the hotelkeeper, and which shall conform to the requirements of the statute.

Section 31 provides that a guest of a hotel within the meaning of that section is, *first*, a person who in good faith occupies a room in a hotel as a temporary home and pays the regular customary charges for such occupancy, but who does not occupy such room for the purpose of having liquor served therein; *second*, a person, who during the hours when meals are regularly served therein, resorts to a hotel for the purpose of obtaining and actually orders and obtains at such time in good faith a meal therein. The requirements of this provision of the statute are very broad and sweeping, and are not in the least ambiguous.

The hotelkeeper's license gives him certain privileges on the Sabbath which must be exercised in conformity to the law. It will be seen from the language of the act that persons who resort to an inn on Sunday for the purpose of procuring and drinking liquor are not guests within the meaning of the statute, and the fact that the hotelkeeper or his servants furnish sandwiches with the liquor does not make such persons guests. To put a sandwich beside a glass of beer when a sandwich is not ordered, and to take it away again without having received any pay therefor, is not serving a meal in good faith with the drink. If a person on the Sabbath goes to a hotel and calls for liquor, and the proprietor or his servant informs him that he cannot be served with liquor unless they furnish him a meal, and a sandwich is brought and placed before him and they call it a meal, it is hardly necessary to say that this is not serving a meal in good faith with the drink as required by section 31 of said act. Such a meal does not make him a guest in the common acceptance of the word. No such device or subterfuge can defeat the policy of the law. This mode of trafficking in liquor by hotelkeepers on the Sabbath is contrary

to the express provision of the statute. The proprietors of hotels, therefore, who permit liquors to be sold in the manner indicated run the risk of having their liquor tax licenses revoked.

A guest within the meaning of the statute is a person who in good faith occupies a room in a hotel as a temporary home, and pays the regular and customary charges for such occupancy, but who does not occupy such room for the purpose of having liquor served therein; or, *second*, a person who during the hours when meals are regularly served therein resorts to a hotel for the purpose of obtaining and actually orders and obtains at such time in good faith a meal therein.

If a person occupies a room in a hotel in good faith for rest or lodging, or actually orders and obtains a meal, he would be a guest, and to such person the hotelkeeper may sell intoxicating liquor under his license. But one who takes a room for a brief period for the sole purpose of procuring and drinking liquor is not a guest within the meaning of the statute, and if the proprietor knowingly permits him to occupy and use the room for such a purpose he violates the law. One who goes to a hotel on the Sabbath and orders a meal not in good faith, not because he is hungry or wants anything to eat, but for the sole purpose of procuring and drinking intoxicating liquor to gratify a craving appetite, is not a guest within the meaning of the statute because he does not order the meal in good faith, and if the proprietor of the hotel knows that the sole and only object in ordering the meal is to obtain intoxicating liquor, then he has no right to furnish it.

If a traveler who is tired and hungry should stop at a hotel on the Sabbath, and at the usual hour for dinner should go into the dining-room, and the only food placed before him was a cheese sandwich, could it be said that the sandwich constituted an ordinary meal? Assume that the guest refused to pay for the meal and the landlord sued him, would any court hold that the sandwich was a meal? I think not. When a person goes to a hotel that is conducted on the American plan and orders a meal, he is usually supplied with a variety of food, as bread, butter, meat, vegetables and tea or coffee.

The learned counsel for the respondent contends that his client should not be held responsible for the wrongful acts of his servants, especially when he had given them instructions not to sell

liquor on Sunday to any person who came to the hotel unless they furnished meals with the liquor.

The intent of the act is to punish an individual only for an actual and intentional violation of its provisions. The act, however, need not be personally committed by the person charged, but if authorized by him or done with his knowledge or assent he is liable. It is a rule of law well settled that the principal is held liable to the public or third persons in a civil action for the frauds, deceits and misrepresentations of his agent committed in the course of the agent's employment, although the principal did not authorize or participate in the transaction. Story Agency, § 452.

There seems to be no escape from the conclusion that the respondent knew that his servants were violating the statute. The respondent was in the room at the time the witnesses ordered and drank the beer, and also while others were drinking beer who were not supplied even with sandwiches. It must be assumed therefore, as this was the usual and customary way of transacting the business in the hotel, that his servants were acting under his instructions. The facts and circumstances testified to by the petitioner's witnesses are not denied by the respondent or any of his witnesses, and they cannot be overcome by a mere statement of the respondent that he had informed his servants not to sell liquor unless they furnished meals. It is evident that the respondent knew that his servants were simply furnishing sandwiches in place of meals to those who ordered liquor, which was a mere subterfuge and done for the purpose of evading the law.

In *Hall v. McKechnie*, 22 Barb. 247, the defendants were indicted for selling strong and spirituous liquors or wines in quantities less than five gallons without a license. It was proved that the defendants were proprietors of a store doing business together; and in the store daily sales of small measures of spirituous liquors were made there by a clerk of the defendants, some of which occurred when the defendants were in the store. This proof warranted the conclusion that the sales were by their authority. Sales by their clerk acting under their directions were made by them, and they thereby incurred the penalty in like manner as if they had personally sold.

It was held in *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 316, that the principal cannot exonerate himself from liability for the acts of his agent by showing that they were committed in

violation of his instructions, or relieve himself of the consequence resulting from actual notice or knowledge of the facts communicated to his agent, by showing utter ignorance on his part. The liability is as absolute as if the acts had been committed by the principal in person, or the knowledge of the particular facts had been communicated to him. In the case last cited, the court says, the act which gives the penalty sued for only subjects him who shall knowingly sell, supply or bring to be manufactured, to any cheese factory, diluted, adulterated or skimmed milk. It is not the act of selling, supplying or bringing to the factory the milk condemned by law that gives the penalty. If so, it would be immaterial whether the owner and proprietor sold or brought the milk in person or by his servants or by the agency of third persons. The act might be regarded as the act of the principal, and he made liable, although taken without his personal knowledge or intervention. *Davis v. Bemis*, 40 N. Y. 453, note; *Perry v. Edwards*, 44 id. 223.

In the Matter of *Michell*, 41 App. Div. 272, *WILLARD BARTLETT, J.*, in the opinion of the court, states, the acts of the respondent's brother, who managed his hotel in his absence, must be deemed the acts of the respondent. The certificate was taken away by a corporation which held an assignment of the instrument from the respondent. The fact that this was done in his absence or without the consent of his agent does not affect his liability. *Matter of Lyman*, 40 App. Div. 46.

The proof in this case warrants the conclusion that the sales of liquor made by the servants of the respondent in violation of the statute were made with his knowledge and consent and under his directions.

The motion, therefore, to revoke and cancel the license must be granted.

Motion granted.

County Court, Sullivan County, August, 1899. Reported. 28 Misc. 699.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MAHAR W. DECKER, Relator, v. JEHIEL W. DECKER, County Treasurer of Sullivan County, Respondent.

Liquor Tax Law—Resubmission of local option in Sullivan county.

A resubmission of the question of local option is void unless the electors of the town, to the number of ten per centum of the votes cast at the next preceding general election, petition therefor in the manner required by statute. (Laws of 1896, chap. 112, § 16.)

In this respect, no distinction exists between the county of Sullivan and the other counties of the State of New York; and neither chapter 439 of the Laws of 1897 providing that town elections in Sullivan county shall be held at the same time as general elections, nor section 7 added to said chapter 439 by chapter 497 of the Laws of 1898, have changed the rule.

CERTIORARI to review the action of the county treasurer of Sullivan county for a refusal to issue a liquor tax certificate to the relator.

T. A. Niven, for relator.

P. W. Cullinan, for respondent.

SMITH, J. The relator presented to the county treasurer of Sullivan county a petition and bond for a liquor tax certificate, under subdivision 2 of section 11 of the Liquor Tax Law, on the 5th day of July, 1899. The county treasurer refused to issue a certificate authorizing him to sell liquor under said subdivision and indorsed upon the petition and statement therefor his reasons for such refusal in the following language:

"July 5th, 1899.

"The statement of Mahar W. Decker, for liquor tax certificate under sub-division two of the Liquor Tax Law, is hereby rejected for the reason that the vote in the Town of Fallsburgh on the Local Option of the Liquor Tax Law at the Fall Election of 1898, was carried against the issuing of a liquor tax certificate under sub-division two.

J. W. DECKER, *Co. Treasurer.*"

On the eleventh day of July following, the relator procured this writ to review the action of said treasurer. The facts upon which the application is based are undisputed. Briefly, they are

as follows: The Liquor Tax Law (Laws of 1896, chap. 112) went into effect on the 23d day of March, 1896. It provided for the submission of the local option questions under section 16 at the annual town meeting occurring next after March 23, 1896. The next annual town meeting in the town of Fallsburgh where the relator resides was held in March, 1897. The questions under section 16 were then submitted to the voters and the question relating to the sale of liquor under subdivision 2 of section 11 was carried in the affirmative.

The act further provides for the submission of the same questions at the town meeting held in every second year thereafter, *provided*, the electors of the town to the number of ten per centum, etc., shall request such submission.

In May, 1897, a special law (Chap. 439) was passed changing the date of the annual town elections in Sullivan county and providing that they should be held at the same time as the general elections. Under this act, as it was amended by chapter 497 of the Laws of 1898, the annual town meeting which would have been held in the spring of 1899, was held in November, 1898. Section 7 of said act provides that the questions relating to the sale of liquors in the several towns of Sullivan, Orange and Rockland counties shall be submitted at the general election in the year 1898, and the liquor tax certificate issued as provided by the Liquor Tax Law.

The town clerk of the town of Fallsburgh submitted the questions under section 16 at the town meeting held in that town in November, 1898, and thereafter certified the result of such vote to the county treasurer in which he stated that the vote upon the second question under section 16 had been carried in the negative. No petition was filed with the town clerk as provided by the Liquor Tax Law requesting such submission. The county treasurer bases his refusal upon such vote and certificate following the requirements of section 16. The relator contends that the vote in the fall of 1898 was illegal and void for the reason that no petition was presented to the town clerk requesting the submission of the local option questions as the statute provides. Whether or not such a petition was necessary, the counsel for the county treasurer concedes, constitutes the only question to be determined in this proceeding.

Under section 16 of the Liquor Tax Law the question of local option was to be voted upon in the spring of 1897, and it could

not again be legally submitted to the voters unless a petition requesting such resubmission was filed with the town clerk. It seems to be clear that the filing of the petition was made a condition precedent to a legal vote upon such questions after the same had been once submitted. Section 16 expressly provides for calling a special town meeting in case the town clerk fails to file the petition in the prescribed time, a thing entirely unnecessary if the vote would be legal without such petition. My conclusion, therefore, is that the questions relating to local option under the Liquor Tax Law could not be lawfully voted upon after the first submission unless a petition requesting such vote was filed. I find nothing in the cases cited by the attorney for the respondent conflicting with these views. They merely hold that errors or irregularities in the petition and mistakes of the town clerk do not vitiate such election.

The next question is whether or not this provision of section 16, requiring a petition to be presented, has been changed by chapter 497 of the Laws of 1898.

The original act was passed in 1897, and contained no reference to local option, but when it was amended by the above chapter, a section (7) was added which has caused this controversy, and which reads as follows: "The questions relating to the sale of liquors in the several towns in the counties of Sullivan, Orange and Rockland, as prescribed in section sixteen of the Liquor Tax Law, shall be submitted to the voters of such towns at the general election in the year eighteen hundred and ninety-eight, and the liquor tax certificate shall be issued in such towns pursuant to the vote upon such questions, as now provided by the liquor tax law. Such questions may again be submitted in such towns, at the town meetings to be held at the time of the general elections in the year nineteen hundred and one, and bi-ennially thereafter, and liquor tax certificates shall be issued pursuant to the vote upon the questions so submitted, as provided by the Liquor Tax Law." The learned counsel for the respondent contends that the object and purpose of this statute was to amend the provisions of the Liquor Tax Law relative to the local option questions, and to provide a different method of submitting those questions in the counties affected by the act. That is, that in those counties no petition was necessary. For several reasons I am unable to agree with him upon the construction of this act.

First. The language of the act itself will bear no such construction. It provided that: "The questions shall be submitted, and the certificate shall be issued, as now provided by the Liquor Tax Law." Leaving out unnecessary phrases, the sentence can be reduced to the above form, and by reference to the punctuation used—a comma after "submitted" and "issued"—it would seem that the clause "as now provided by the Liquor Tax Law," relates as much to the first clause, *i. e.*, the questions shall be submitted, as to the last, *i. e.*, the certificate shall be issued. According to this construction, the section provides that the questions shall be submitted as now provided by the Liquor Tax Law. That is, a petition must be presented as a condition precedent to such submission.

Second. Section 7 of the act of 1898 nowhere mentions any thing about a petition, and if the construction contended for by the learned counsel should be followed, it would be unnecessary to file any petition at any of the future elections held under the act in the towns named. The last sentence says that the questions may again be submitted in 1901, and biennially thereafter. If no petition is necessary, then the important question of local option would rest entirely with the town clerk or other officer whose duty it is to provide the ballots at town elections, and he alone could say whether the people in the towns affected by the act should vote upon this question. Counsel for the respondent contends that the evident intention of the Legislature was to make special provision for submission during the period from 1898 to 1901, and thereafter have the provisions of the general act apply. But why? For what reason should the general act apply after 1901 any more than before that time? One submission had already been had in 1897, and the expression of the voters obtained, and it is difficult to see for what reason any other absolute submissions were necessary in the counties named any more than in other counties of the State.

Furthermore, the section says nothing about any petition, and it cannot be construed to mean that a petition was not necessary at the first elections, but should be filed for subsequent ones.

Third. This act was not intended to make any change in the general statute upon the excise question. It was passed as its title shows, "to provide for the holding of annual town meetings and elections in the counties of Rockland, Orange and Sullivan." At first it was entirely silent upon the question of local

option, but under the peculiar language of the Liquor Tax Law, providing that "the same questions shall be again submitted in the same way at the town meeting held in every second year thereafter," some doubt seems to have arisen in the Legislature as to how this act would be affected by the local act changing the date of the town elections, and hence the addition of section 7 when the act was amended.

I conclude, therefore, that the act of 1898 does not amend or alter the general provisions of the Liquor Tax Law with reference to local option in the several towns of Sullivan, Orange and Rockland counties; that a petition as provided in section 16 of the general act was necessary as a condition precedent to a valid submission of the local option questions in said towns at the town elections in 1898, and as no such petition was filed with the clerk of the town of Fallsburgh prior to such election, the vote upon the second question submitted was invalid. It follows that the relator is entitled to an order directing the county treasurer to issue to him a liquor tax certificate on payment of the fees therefor.

Ordered accordingly. _____

Supreme Court, Onondaga Special Term, August, 1899. Reported.
29 Misc. 29.

Matter of the Petition of MAYNARD N. CLEMENT, Deputy State Commissioner of Excise, for an Order Revoking and Canceling a Liquor Tax Certificate, Issued to H. H. WILCOX, Agent, etc.

Liquor Tax Law—Election as to local option.

Where there has been a full and fair vote in a town against local option, the fact, that the petition for the submission of the issue was not signed and acknowledged by the electors of the town to the number of ten per centum of votes cast at the next preceding general election, is not material and does not justify a county treasurer in issuing a liquor tax certificate.

MOTION for an order canceling a liquor tax certificate.

Wm. E. Schenck, for motion.

Chas. D. Thomas, opposed.

WRIGHT, J. On the 14th day of February, 1899, at the annual town meeting, the electors of the town of Winfield, Herkimer

county, wherein the defendant was a resident, decided under the Local Option Law against permitting the sale of liquors in that town. The town clerk immediately filed in the county treasurer's office his official statement of the vote and decision. The county treasurer, notwithstanding that vote and notification, subsequently issued the certificate in question.

The defendant claims the treasurer's action was legal, on the ground that the election was illegal, because the petition for the submission of the license questions to a vote under the Local Option Law, was not signed and acknowledged by voters to the full number of one-tenth of those who voted at the last general election of said town.

That there was a full and fair vote on this question is not challenged. It is not alleged that the irregularity in the petition affected the expression of the will of the people.

In the case of the *People ex rel. Crane v. Chandler*, as Town Clerk, etc., decided at the May term, 1899, by the Appellate Division of the fourth department (41 App. Div. 178), the town clerk posted notices only four days before the town meeting that the license questions would be submitted. It was held that the failure to file with the town clerk twenty days before town meeting the request for such vote, and the failure of the clerk to give at least ten days' notice that a vote would be taken on those questions by a ballot at the town meeting, as required by section 34 of the Town Law (1 R. S. [Banks' 9th ed.] 737), did not vitiate the election where it appeared that there was a full vote on those questions; citing *People ex rel. Hirsh v. Wood*, 148 N. Y. 142, wherein the court say:

"We can conceive of no principle which permits the disfranchisement of innocent voters, for the mistake or even the willful misconduct of election officers in performing the duty cast upon them. The object of popular elections is to ascertain the popular will, not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice, and to prevent fraud."

It must be held, therefore, that the irregularity of the petition in this case did not affect the validity of the election.

Motion granted, with \$20 costs to the petitioner.

Motion granted, with \$20 costs.

Fourth Appellate Department, September, 1899. Reported. 43 App. Div. 336.

JOSEPH W. BAKER, Appellant, *v.* LORENZO O. BUCKLIN, Individually and as County Treasurer of the County of Herkimer, N. Y., Respondent.

Liquor tax certificate—Excessive amount paid therefor under a mistake of law—It is not recoverable from the successor of the county treasurer who received it.

A village hotel keeper who, "under a mistake as to the requirements of the Liquor Tax Law," has paid an excessive amount for a liquor tax certificate on the alleged demand of the county treasurer, who thereupon paid over one-third of such amount to the State Treasurer and the other two-thirds to the village, as required by statute, is not, in an action brought by him against the successor of such county treasurer in his individual and representative capacity, entitled to recover the excess of payment so made, as such payment was a voluntary one made under a mistake of law, and the defendant has no authority to devote to the payment of the plaintiff's claim other excise moneys in his hands.

APPEAL by the plaintiff, Joseph W. Baker, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Herkimer on the 23d day of May, 1898, upon the decision of the court, rendered after a trial before the court without a jury at the Herkimer Trial Term, dismissing the complaint upon the merits.

On or about May 1, 1896, John T. Kerrivan, as county treasurer of Herkimer county, issued to plaintiff as a hotelkeeper in the village of Herkimer, in said county, a liquor tax certificate, for which he received from the plaintiff the sum of \$200. Neither in the last State census nor in the last United States census was the population of the village of Herkimer stated separately from the population of the town of Herkimer. Within ten days after the receipt of the moneys by the said Kerrivan, he paid one-third thereof to the State Treasurer and two-thirds to the village of Herkimer, as he was required to do by the statute. Thereafter the plaintiff demanded a return of the \$100 which had been paid in excess of the fee required by the statute. The term of office of the said Kerrivan expired, and this defendant became county treasurer upon January 1, 1897. He received from the said Kerrivan such moneys and papers as were in his hands. Demand was also made of defendant for the return of said moneys, and

this action was brought therefor. The plaintiff alleged in his complaint the payment of said moneys and that the excess was paid by plaintiff "on demand of the said county treasurer under a mistake as to the requirements of the Liquor Tax Law." Upon the trial of the action a jury was waived and the case was submitted to the court, which, after having considered the same, dismissed the complaint, with costs. From the judgment entered upon such decision this appeal has been taken.

William J. Gardinier, for the appellant.

Eugene E. Sheldon, for the respondent.

SMITH, J.:

The plaintiff encounters two obstacles to his recovery. He has conceded upon the trial that the defendant is not liable individually. It appears from the evidence that he has none of the moneys which the plaintiff claims to have paid to his predecessor through mistake. Those moneys have all been paid, pursuant to the law, either to the State or to the village of Herkimer. The fact that defendant has other moneys in his hands paid to him for like purposes would not authorize him to pay the plaintiff's claim. As to the disposition of that fund the statute has given him explicit directions. It is nowhere provided that any part thereof may be held by the treasurer for the repayment of any moneys paid by mistake by other holders of certificates.

Again, the plaintiff in his complaint predicates his right to recover upon the ground that it was paid upon the demand of the said county treasurer and under a mistake as to the requirements of the Liquor Tax Law (Laws of 1896, chap. 112). It is difficult to see how the plaintiff can escape the rule of law that voluntary payments cannot be recovered. We are referred to no authority which holds that payment made under like circumstances can in any event be held to have been made under duress. A contrary rule of law seems to be held in *New v. Village of New Rochelle* (91 Hun, 214). We are unable to find any evidence of any mistake of fact upon which the payment was made. Such evidence would not have been admissible under the complaint. In *Phelps v. Mayor* (112 N. Y. 219) Judge GRAY, in writing for the court, says: "The principle is elementary that a party cannot recover back money paid upon the ground that he supposed he was bound

in law to pay it." Without allegation or proof that the moneys were paid under a mistake of fact the plaintiff's case seems barren of any substantial ground of recovery.

It becomes unnecessary then to consider the other objections made to the plaintiff's recovery, and it follows that the judgment should be affirmed, with costs.

All concurred, except McLENNAN, J., not sitting.

Judgment affirmed, with costs.

Fourth Appellate Department, September, 1899. Reported. 43 App. Div. 622.

In the Matter of the Petition of A. H. LEET, for an Order Revoking and Cancelling Liquor Tax Certificate No. 1, issued to JOHN KING.

This was an appeal from an order denying a motion to revoke and cancel a liquor tax certificate issued to John King of the town of Covert, Seneca county, N. Y. The town of Covert voted in favor of a license at a town meeting held February 11, 1896. King made application to and received from the excise board of the town of Covert a license to traffic in liquors, which license was to expire May 1, 1896. Said King trafficked in liquors in said town up to May 1, 1896. From May 1, 1896, to May 1, 1897, said King trafficked in liquor under a license obtained by him pursuant to Liquor Tax Law. At the annual town meeting held in Covert February 9, 1897, the town of Covert voted in the negative upon all of the local option questions of section 16 of said act, except as to the selling of liquors by a pharmacist on a physician's prescription. Thereafter and on February 14, 1899, the town voted in favor of all four propositions submitted. Thereafter the said King made application for and obtained liquor tax certificate. He obtained no consents from any of the eight owners of buildings used exclusively as dwellings within two hundred feet of the premises licensed, claiming that such consents were unnecessary. It appeared that after the town of Covert had voted no license, and after May 1, 1897, said King vacated the premises where he had been conducting a saloon and went to

reside at East Varick, where he conducted a hotel for nearly two years. His family went with him and the premises at Covert were used as a repair shop and small store, and for two years or more no traffic in liquors was carried on at said premises in Covert. The premises at Covert were owned by said King's wife.

John A. Milne, attorney for petitioner.

Where the business of one proprietor is closed up and no resumption attempted for sixty days by his successor, the privilege which the law grants must be regarded as surrendered. *People ex rel. Bagley v. Hamilton*, 25 App. Div. 428.

If an abandonment for two months, as in the case of *People ex rel. Bagley v. Hamilton (supra)*, does not work a forfeiture of the privilege conferred by statute, then an abandonment for a much longer time would not have that effect. The Legislature could not have intended that the protection sought to be given to our schools and churches should be of such little value. *People v. Murray*, 148 N. Y. 171; *People v. Board*, 7 Misc. Rep. 415; *People v. Lammerts*, 18 Misc. Rep. 343; *In re Ritchie*, 18 Misc. Rep. 341; *In re Zinzow*, 18 Misc. 653; *In re Korndorfer*, 49 Supp. 559.

If after the traffic in liquors in Covert had been discontinued by the local option vote, a church or school house had been built within two hundred feet of King's property, it cannot be contended that he could return twenty years after and open up business, simply because he had a license on March 23, 1896. The Legislature never intended such a construction of the Liquor Tax Law. A thing which is within the intentions of the makers of a statute is as much within the statute as if it were within the letter. *Riggs v. Palmer*, 115 N. Y. 506.

Charles A. Hawley, attorney for King.

The appeal should be dismissed, because King's certificate had expired by its own limitation before the appeal herein was taken, and therefore cannot be revoked by any order now to be made. The order appealed from should be affirmed because it appears that King never held the tax certificate assailed by petition herein.

Neither the certificate holder nor the premises on which the liquor traffic is carried on lose the benefit of the exception provided in statute by reason of fact that under the compulsion of the Liquor Tax Law and the vote of the people of the town, the traffic has been temporarily suspended for two years. None of the cases cited by the appellant was a case of voluntary abandonment. That which the words declare is the meaning of the instrument, and the courts have no right to add or take away from that meaning. (Black on Interpretation of Laws, Sec. 8.)

If a statute is open to more than one construction that should be adopted which will not work private hardship. Black, Sections 46, 47.

Appeal dismissed, without costs. All concurred.

Fourth Appellate Department, September, 1899. Reported. 43 App. Div. 623.

HENRY H. LYMAN, as State Commissioner of Excise, Respondent, against NORRIS GRIFFIN, and American Bonding and Trust Company, Appellants.

This is an appeal from an order setting aside a verdict in favor of defendants and granting a new trial with ten dollars costs against defendants.

Ernest I. White, attorney for appellant.

This action, if not penal, is of a penal character, since, previous to the bringing of this civil action, the defendant must have been guilty of a breach of the Liquor Tax Law, which breach was a misdemeanor. In penal actions and those of a kindred character the court will not grant a new trial or disturb a verdict of a jury unless some misdirection has been given or error of law has been committed. For error of judgment in jury in weighing the evidence where verdict is for defendant, the court will not grant a new trial. *Decker v. Stauring*, 57 Howard 495; *Wheeler v. Calkins*, 17 How. 451; *Overseers of Poor of Rochester v. Lunt*, 18 Wend. 565; *Comfort v. Thompson*, 10

Johns. 101; *Sawyer v. Smith*, 1 Denio 207, 22 Barb. 528. The same rule applies where verdict is for defendant in action for libel, slander and also assault and battery. *Rundell v. Butler*, 10 Wend. 119; *Hurtin v. Hopkins*, 9 Johns. 37; *Chase v. Bassett*, 15 Abb. Practice N. S. 293. The theory is that by the grant of an order for a new trial, the defendant will be put in jeopardy a second time in respect of the penalty. The verdict was not contrary to the evidence; there was sufficient evidence for the jury to find for defendant; and no question can be raised by plaintiff as to the verdict being contrary to law, for the reason that there are no exceptions taken in the plaintiff's case and if any error of law was made it was to advantage of plaintiff. This is a quasi criminal action and plaintiff must prove his case beyond a reasonable doubt. It was improper to assess costs in favor of plaintiff on granting his motion to set aside verdict. Costs should have been assessed against plaintiff. *Overing v. Russell*, 28 How. 151; *Jackson v. Thurston*, 3 Cow. 342; *Bank of Utica v. Ives*, 17 Wend. 501; *Ward v. Woodburn*, 27 Barb. 354; *East River Bank v. Hoyt*, 22 How. Pr. 478.

Mead & Stranahan, attorneys for respondent.

The verdict was so clearly against the weight of evidence as to furnish proof that the jury was influenced by prejudice. The trial justice had the right, and it was his duty, to set the verdict aside if clearly against the weight of evidence although a motion for a direction of a verdict made at the close of the case on behalf of the plaintiff had been properly denied. *Mulligan v. N. Y. C. & H. R. R. Co.*, 11 N. Y. Supp. 457. Even if the conflict of testimony require that case be sent to jury in first instance, still the court would be justified in setting aside the verdict and ordering a new trial if justice seems to require it. *Suhrada v. Third Avenue R. R. Co.*, 14 App. Div. 363. Where there is no evidence upon an issue, or the weight of evidence is so decidedly preponderating in favor of one side, it is the duty of the trial judge to non-suit or direct a verdict as the case may require. *Improvement Co. v. Munson*, 14 Wall. 442; *Linkhauf et al. v. Lombard et al.*, 137 N. Y. 425; *Hemmans v. Nelson*, 138 N. Y. 529-530. This was an action upon a contract, and is in no wise of a criminal or quasi criminal nature. *Lyman v. Gramercy Club*, 28 App. Div. 30. It was imma-

terial to the issue whether the violation was committed with or without the knowledge of defendant Griffin. *Smith v. Reynolds*, 8 Hun, 129; *Overseers of Poor v. Hall*, 20 Weekly Digest 33; *Amerman v. Kall*, 34 Hun, 126; *Lee v. Village of Sandy Hill*, 40 N. Y. 448; *Story on Agency*, p. 563. The granting of costs on the motion was discretionary with trial court, but, if not, the order can be properly modified by this court.

Order modified by striking out the item of ten dollars costs, and as thus modified affirmed, without costs of this appeal to either party. All concurred. McLENNAN, J., not sitting.

Fourth Appellate Department, September, 1899. Reported. 43 App. Div. 623.

HENRY H. LYMAN, as State Commissioner of Excise, Respondent,
against JAMES HAYES and FIDELITY AND DEPOSIT COMPANY, of
Maryland, Appellants.

APPEAL from an order of the Trial Court directing a verdict for plaintiff in an action to recover on a bond given pursuant to section 18 of the Liquor Tax Law, it being alleged that conditions of bond were violated by defendant's suffering and permitting gambling with cards to be done on the licensed premises.

Tracy, Boardman & Platt, Attorneys for Appellant, Fidelity & Deposit Co.

Hiscock, Doheny, Williams & Cowie, of Counsel.

A verdict can be directed only where the evidence is undisputed or so certain and convincing that a reasonable man could come to but one conclusion. *Illston v. Evans*, 27 App. Div. 447; *Bulger v. Rosa*, 119 N. Y. 459; *Bagley v. Bowe*, 105 N. Y. 171; *Bloom v. Cox Shoe Co.*, 154 N. Y. 711. Conflict of testimony between two witnesses raises a question for jury. *Felbel v. Kahn*, 29 App. Div. 270. It is the "rule and policy of the law to allow all testimony to go to and be weighed by the jury." *Williams v. D. L. & W. R. R. Co.*, 155 N. Y. 158; *Ten Eyck v. Whitbeck*, 156 N. Y. 341; *Hunter v. N. Y. O. & W. R. R. Co.*, 116 N. Y. 615; *People v. Chap-*

lean, 121 N. Y. 266. In determining this appeal, the facts and circumstances most favorable to appellants must be regarded as established, for the court having directed a verdict the parties against whom it was directed are entitled to the most favorable inferences deducible from the evidence. *Rehberg v. Mayor, etc.*, 91 N. Y. 137; *Weil v. D. D. E. B. & B. R. R. Co.*, 119 N. Y. 147-152; *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478; *Higgins v. Eagleton*, 155 N. Y. 466; *Ten Eyck v. Whitbeck*, 156 N. Y. 341. Assuming the truth of plaintiff's evidence, the bond was not necessarily and as a matter of law, violated, for upon the facts proved, only a jury could predicate the conclusion as to whether the defendant was carrying on the traffic, business or occupation of gambling or permitting the same to be carried on on his premises, and at the same time trafficking in liquors.

Mead & Stranahan, attorneys for plaintiff-respondent.

The plaintiff was entitled to recover the full sum named in the bond, if entitled to recover at all. *Lyman v. Rochester Title Insurance Co., et al.*, 37 App. Div. 234; *Lyman v. Shenandoah Social Club, et al.*, 39 App. Div. 459; *Lyman v. Gramercy Club, et al.*, 39 App. Div. 661; *Lyman v. Broadway Garden Hotel & Cafe Co.*, 33 App. Div. 130. The principal is liable to third persons, in a civil action, for the frauds, torts, negligences and other malfeasances of his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed, know of, such misconduct, or even if he forbade the acts, or disapproved of them. *Story on Agency*, p. 452-563; *Lee v. Village of Sandy Hill*, 40 N. Y. 448; *Davis v. Bemis*, 40 N. Y. 453; *Attorney General v. Sidden*, 1 *Crompt. & Jer. R.* 219; *Commonwealth v. Nichols*, 10 *Metcalf, R.* 259. This principle has been applied uniformly by the courts as to violations of the excise law. *Smith v. Reynolds*, 8 *Hun* 129; *Overseers of Poor v. Hall*, 20 *Weekly Digest* 33; *Amerman v. Kall*, 34 *Hun* 126; *George v. Gobey*, 128 *Mass.* 289; *Meeham on Agency*, sec. 745; *Matter of Michell*, 41 App. Div. 272; *Matter of Kinzel*, 28 *Misc.* 622. The rule seems to be based not upon any presumed authority in the agent to do the acts, but upon the ground of public policy. *Lee v. Village of Sandy Hill*, *supra*; *Davis v. Bemis*, *supra*. Where there is no evidence upon an issue before the jury, or the weight of evidence is so decidedly preponderating in favor

of one side, it is the duty of the trial judge to non-suit or to direct a verdict, as the case may require. *Linkhauf et al. v. Lombard*, 137 N. Y. 425; *Hemmens v. Nelson*, 138 N. Y. 529-530.

Arthur Beebe, attorney for appellant, James Hayes.

William L. Barnum, of counsel.

(No points.)

Judgment affirmed with costs. All concurred.

Fourth Appellate Department, September, 1899. Reported. 43 App. Div. 623.

In the Matter of the Application of J. FRANK ANTISDAL, Appellant, for the Revocation and Cancellation of the Liquor Tax Certificate of CHARLES M. RIFENBURGH, Respondent.

APPEAL from an order granted denying appellant's application for revocation and cancellation of liquor tax certificate.

F. E. Converse, attorney for appellant.

Respondent's right to receive and county treasurer's right to issue certificate depends altogether upon statements made in application therefor. No discretion whatever is vested in county treasurer. *People ex rel. Belden Club v. Hilliard*, 28 App. Div. 140; *In re Fall*, 26 Misc. 611; *In re Bridge v. Morhmann*, 25 Misc. 213.

It appeared upon face of respondent's application that the traffic in liquor was to be carried on in connection with business of keeping a hotel and that all the requirements of section 31 had not been complied with at date of application. Suspension of traffic while the hotel was being completed constituted an abandonment of traffic in liquors which deprived the place where such traffic was lawfully carried on March 23, 1896, of its privileged character and the owner's consent should have been filed. *People ex rel. Lammerts*, 18 Misc. 343, 348; *In re Ritchie*

v. Samuelly, 18 Misc. 341, 342; In re Bridge, 25 Misc. 213, 215; In re Kessler v. Cashin, 28 Misc. 336; In re Lyman v. Fuhrman, 24 Misc. 92; In re Korndorfer, 49 N. Y. Supp. 559.

A liquor tax certificate is not a contract but a license granted under the police power of the Legislature. In re Bradley v. Hall, 22 Misc. 301. And is property in a limited sense only. In re Livingston v. Shady, 24 App. Div. 51.

G. S. Tinklepaugh, attorney for respondent.

The consent of the owner of the premises was given in fact, although not filed. Suspension of active business for about one week under circumstances of this case, does not constitute an abandonment. People ex rel. Bagley v. Hamilton, 21 Misc. 375.

The certificate was lawfully issued pursuant to sec. 11 of the Liquor Tax Law although the buildings were not yet completed and the issuing of the certificate is *prima facie* proof that all requirements have been complied with. In re Purdy, 40 App. Div. 133; Com. Off. Series No. 318, p. 133.

The owner of the certificate can not be deprived of it except for some violation of the law. Matter of Hilliard, 25 App. Div. 224; People v. Durante, 19 App. Div. 292; Niles v. Mathusa, 20 App. Div. 483.

Conformance with the statute with technical strictness, will not be insisted upon, where equity and justice demand that an action of an official be sustained, although there may be a technical irregularity in his action. People ex rel. Leonard v. Hamilton, 42 App. Div. 212. See opinion of SPRING, J., Com. Off. Series No. 330, p. 217.

Order affirmed with ten dollars costs and disbursements.

HARDIN, P. J., McLENNAN and SPRING, JJ., concurred. ADAMS and SMITH, JJ., dissented.

Fourth Appellate Department, September, 1899. Reported. 43 App. Div. 623.

The PEOPLE OF THE STATE OF NEW YORK, Respondent, against
EDWARD J. DILLON, Appellant.

APPEAL from judgment of conviction, upon verdict of jury finding defendant guilty of violating Liquor Tax Law by wrongfully selling, exposing and giving away liquors on Sunday.

Southworth & Gaffney, attorneys for defendant-appellant.

The court erred in the admission of testimony as to the equipment of the interior bar-room where the violation was charged to have been committed. *People v. Owens*, 148 N. Y. 650-651.

Facts which form the basis of the *corpus delicti* are to be proved either by direct evidence or by presumptive evidence of the most cogent and irresistible kind. *American & Eng. Ency. of Law*, vol. 7, p. 863; *Best on Evidence*, 2d vol. p. 751; *State v. Flanagan*, 26 W. Va. 122; *State v. Davidson*, 30 Vt. 385, 386.

In criminal cases there must be proof that a crime has been committed; also that defendant committed the crime. Both can not be proved by circumstantial evidence; there must be direct evidence of one of the other. *People v. Ruloff*, 18 N. Y. 179; *People v. Bennett*, 49 N. Y. 143.

In circumstantial evidence, "the evidence of facts and circumstances must be such as to exclude to a moral certainty, every hypothesis, but that of guilt of the offense imputed. *People v. Owens*, 148 N. Y. 648; *People v. Ledwon*, 153 N. Y. 18; *People v. Fitzgerald*, 156 N. Y. 253.

A new trial should have been granted because of the improper statement made by the district attorney in summing up, that jury might presume defendant took out liquor tax certificate in his wife's name because he had been convicted. *Criminal Code*, sec. 393; *People v. Rose*, 22 State Reporter, 393; *People v. Greenwall*, 115 N. Y. 520-527.

Timothy Curtin, district attorney, for the people.

Evidence descriptive of the place, the condition of the room and the contents is proper. *People v. Owens*, 148 N. Y. 650.

Under section 31 of the Liquor Tax Law the giving away or

offering for sale of liquors on Sunday, except as allowed, is a violation of the law. *People v. Murphy*, 5 Parker's Crim. Rep. 130; *People v. Cramer*, 22 App. Div. 189.

Request in defendant's fifth point that a new trial be granted because of improper statements, made by district attorney in summing up, is not well taken. *Cole v. Fall Brook Coal Co.*, 159 N. Y. 63.

Judgment should be given on appeal without regard to technical errors or defects. Code of Criminal Pro. sec. 542; *People v. Shaver*, 37 App. Div. 21-24; *People v. Combs*, 158 N. Y. 540.

Judgment of conviction and order affirmed, and judgment to be entered and certified to Oneida County Court, with directions to proceed in accordance with section 547 of the Code of Criminal Procedure. All concurred.

Supreme Court, New York Special Term. Reported in N. Y. L. J.,
October 31, 1899.

In the Matter of the Application of JAMES HARPER for an order
restraining JULIUS KELLER from unlawfully trafficking in
liquor.

BOOKSTAVEN, J.:

This is an application under section 29 of the Liquor Tax Law to enjoin the respondent from trafficking in liquors until he lawfully obtain a liquor tax certificate. When the answer was handed up on the return day it was objected that another similar proceeding was pending by the same petitioner against the same respondent. The petitioner's attorney waives the objection that such pendency is not pleaded, and concedes that another proceeding is pending, but one under section 28, subdivision 2, of the act, and is for the revocation of the liquor tax certificate under which the respondent is doing business, and is brought against both the respondent and the special deputy commissioner of excise of the city of New York. It is obvious that the two proceedings are different and were not meant to be exclusive of each other. Inasmuch, however, as the issues are much the same, the referee before whom the other proceeding is pending will be named in this. Submit order.

Supreme Court, New York Special Term. Reported N. Y. L. J.,
October 31, 1899.

In the Matter of the Application of MAX STEINER to revoke the
liquor tax certificate of FRANCIS MCGOLDRICK.

BOOKSTAYER, J.:

This application to cancel and revoke a liquor tax certificate is very similar in its facts to the Fall case (26 Misc. 611, aff'd 39 App. Div. 671), and the motion should be granted on that authority. The law does not, and should not, give any help to the man who first, on his application and for the purpose of securing the certificate, swears that the business is his own, and then, on supplementary proceedings, and for the purpose of defeating his creditors, swears it belonged to another. Motion granted, with \$10 costs.

First Appellate Department, October, 1899. Reported. 44 App. Div. 30.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANK D. SMAW
Appellant, v. PATRICK J. MCGOWAN and MARTIN J. MCGOWAN,
Copartners, under the Firm Name of MCGOWAN BROTHERS,
Respondents.

Liquor tax certificate—A petition to revoke it must show that the petitioner is a person authorized to make the petition—Form of the verification thereof.

A petition for the revocation of a liquor tax certificate which contains no allegation that the petitioner is one of the persons authorized by section 29 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312) to present such a petition, is fatally defective.

Semble, that the verification of such a petition, presented under section 29 of the Liquor Tax Law, should be in the form prescribed by section 526 of the Code of Civil Procedure, and that if it be made by the petitioner, it need not state the grounds of his information and belief.

APPEAL by the relator, Frank D. Smaw, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 17th day of April, 1899, dismissing a proceeding taken under the

Liquor Tax Law to revoke a liquor tax certificate held by the defendants.

Frank D. Smaw, for the appellant.

E. Marshall Pavey, for the respondents.

RUMSEY, J.:

The statute (§ 29 of the Liquor Tax Law) requires that a verified petition should be presented to the court as the basis of the proceeding here sought to be taken. The petition which was served contained a verification which it is claimed was defective, and the defendants gave notice that they elected to consider the petition a nullity, because the verification was defective and insufficient.

The Liquor Tax Law contains no direction as to what is to be stated in the verification, and the rule in that regard, therefore, is that prescribed by the Code of Civil Procedure. Section 526 of the Code prescribes that the affidavit of verification must be to the effect that the proceeding "is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true." The verification presented was in that precise form. It was made by the petitioner himself, who was a party to the proceeding.

But it is claimed that the petition is defective, because it does not show that the deponent had any good ground for his information and belief. To this there are two answers. In the first place, as the verification was made by the party himself, the statute did not require him to show any grounds for his information and belief, and whatever he stated on the subject was pure surplusage. In the second place, it cannot be said that the statements did not show good grounds for the information and belief of the facts alleged in the petition, so that even if the statement of the sources of his information was required, that made in the verification is quite sufficient.

But although the petition was dismissed on that ground, yet if there is any other fatal defect which would warrant the action of the court, the order must be affirmed. That there is such a defect is quite clear. By section 29 of the Liquor Tax Law, as amended in 1897, the authority to present a petition asking

for the revocation of a tax certificate for a violation of the law, is given to certain officials, and to a taxpayer of the county where the certificate is issued. No others can present it. The petition contains no allegation that the petitioner is either one of the officials named in the statute, or a taxpayer of the county of New York. He had, therefore, no authority to present the petition asking for the revocation of this tax certificate. For this reason the action of the learned justice was correct and must be sustained, and the order affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

Court of Appeals. Reported. 160 N. Y. 96.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate No. 10,320, Issued to MALCOM BREWING COMPANY, Respondent.

1. Liquor Tax Law—Certificate as transferable property—Protection against revocation.

A liquor tax certificate constitutes, under the present law (Laws of 1897, chap. 312, § 27), a species of property transferable by the party procuring the same; the privilege or right which it confers upon the holder can not be revoked except in the manner and for the causes prescribed in the statute; and the holder may invoke the general rules of law for the protection of property in any proceeding having for its object the forfeiture or destruction of the right which the certificate confers.

2. Original holder of certificate, having permitted its lawful use to another, not responsible for user's traffic at unlicensed place.

Where the original holder of a liquor tax certificate has permitted another to use it to do business at the place designated therein, and it does not appear that the relation of principal and agent existed between them, or that the original holder intended or authorized the use of the certificate in any other than a lawful way, if the user traffics in liquor at another place than that designated in the certificate, he acts, as to such business, simply without a license, and he alone, and not the original holder of the certificate, is responsible for the consequences.

3. Certificate for designated place on ball ground—Incidental delivery of beer at other places on ground.

Where a liquor tax certificate designates a particular place on a ball ground, the delivery of beer to the public on the ground where games of ball are being played, at places other than the precise location specified in the certificate, does not constitute a violation of the law by any one, where such delivery is an incident to and part of the business which might be carried on under the certificate.

4. Scope of traffic under certificate for designated place on public grounds.

The business of trafficking in liquor, authorized by a liquor tax certificate designating a place in a park or upon public grounds where people congregate on special occasions, comprehends something more than the right to sell over a bar at the designated point to such persons as go to the bar to be served. It fairly includes the right of the holder to distribute liquors in the glass by waiters to the patrons of the public place where the bar is located.

5. Conviction a condition precedent to forfeiture and revocation of certificate for violation subsequent to issuance.

Where there is no claim that the party procuring the liquor tax certificate was not entitled to receive or hold it at the time it was delivered, but it is claimed that by a subsequent violation of the law, covered by prescribed penalties, the certificate has been forfeited, the forfeiture can not be enforced by a summary application to a judge for a revocation of the certificate, but can be enforced only upon an indictment or criminal charge, conducted according to the rules governing criminal procedure, and after a conviction by a jury.

Matter of Lyman, 40 App. Div. 46, affirmed.

(Argued June 7, 1899; decided October 3, 1899.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 3, 1899, affirming an order of Special Term denying an application for a revocation of a liquor tax certificate.

The facts, so far as material, are stated in the opinion.

S. B. Mead, for appellant. The violation complained of was such a violation as would justify the criminal conviction of the holder of the certificate in question. (L. 1897, ch. 312, §§ 17, 34.) Stevens was trafficking in liquors at the premises in question as agent of the Malcom Brewing Company. (*People ex rel. v. Murray*, 148 N. Y. 171; *Matter of Ritchie*, 18 Misc. Rep. 341; *Matter of Zinzow*, 18 Misc. Rep. 653; *People ex rel. v. Lyman*, 156 N. Y. 407.) The Malcom Brewing Company is liable for the wrongful acts of its agent Stevens, whether committed with or without

their knowledge, assent or authority. (L. 1897, ch. 312, § 34, subd. 3; *Smith v. Reynolds*, 8 Hun, 129; *Overseers of the Poor v. Hall*, 20 Wkly. Dig. 33; 107 Mass. 199; *Amerman v. Kall*, 34 Hun, 126; Story on Agency, 563; *Lee v. Vil. of Sandy Hill*, 40 N. Y. 448; *Atty.-Gen. v. Liddon*, 1 Crompt. & P. 219; *Comm. v. Nichols*, 10 Metc. 259; *V. C. Co. v. Murtaugh*, 50 N. Y. 320; *United States v. Voss*, 1 Cranch, 101; *United States v. Connors*, 1 Cranch, 102.) Two distinct violations of law, by selling liquor at a "second place, distinctly maintained," were proven and stand on the record undisputed. (L. 1897, ch. 312, § 11, subd. 6.)

J. F. Bulwinkle for respondent. There being a manifest defect of jurisdiction as alleged in the petition, upon which this proceeding was commenced, it is still tenable as an objection for the purpose of affirming the order of the lower court. (L. 1897, ch. 312, §§ 28, 29, 34; *Delafeld v. Illinois*, 2 Hill, 159; *Holmes v. Honie*, 8 How. Pr. 383; *Hallett v. Righters*, 13 How. Pr. 43; *Pitt v. Davison*, 37 Barb. 97; *Davis v. Packard*, 8 Pet. 312.) The person to whom the liquor tax certificate was delivered was not the agent of the Malcom Brewing Company. The liquor tax certificate was delivered to him, and he was to pay for it in the extra price for the lager beer sold to him. The Malcom Brewing Company had no interest in the business carried on at this particular place. (*Robinson v. Easton*, 93 Cal. 82; *Gibney v. Curtis*, 61 Md. 192; *Adams v. Whittlesey*, 3 Conn. 567; *Ripley v. Little*, 19 Wkly. Dig. 165; *People v. Utter*, 44 Barb. 170; L. 1897, ch. 312, § 11, subd. 1.) The conviction of the bartender for the violation of Laws 1892, chapter 401, was not ground for the revocation of the license. (*People ex rel. v. Exercise Comrs.*, 2 App. Div. 89.)

O'BRIEN, J. The commissioner of excise filed a petition with the court, praying that the liquor tax certificate issued by him under the statute to the Malcom Brewing Company, a corporation, be revoked and canceled, on the ground that it had been forfeited by the acts of the company which were alleged in the petition. The court, at Special Term, denied the application, and the Appellate Division has affirmed the order.

The application to revoke the license was based upon an allegation that the person holding it sold liquor at more than one place on the premises described in the certificate, in violation of the statute. The company was authorized by the certificate to traffic in liquors at a place therein described, in these words:

"Inside Washington Park Base Ball Grounds, north side of Third street, three hundred and fifty feet east of Third avenue, Brooklyn." The misconduct alleged on the part of the company as the ground for revoking the certificate is that, on a day named, it sold two glasses of lager beer to a person named on another part of the grounds or park, and, as claimed, at another place, without having paid the tax for the permission to sell at that particular place. The application seems to be founded upon the theory that the delivery of any liquors by the company to visitors upon the grounds, except at the precise place designated in the certificate, was a violation of the penal provisions of the statute, and a legal cause for the revocation of the certificate.

The company paid the tax on procuring the certificate, but the commissioner claims that this certificate thus procured has been forfeited because sales of beer were made upon the grounds by the holder at another place than that described therein. The sale of the lager beer at the other place, for which a forfeiture of the license is claimed, appears to have been made to a special agent of the commissioner. The testimony upon which the court dismissed the proceedings disclosed substantially the following facts: The business of selling the beer on the grounds was carried on by one Stevens, to whom the company sold beer and gave the use of the certificate. He owned the liquor and had the profits of the business.

Liquor tax certificates, or the right to engage in the sale of liquors, constitute, under the present law, a species of property transferable by the party procuring the same. (Laws of 1897, ch. 312, § 27.) The privilege or right which it confers upon the holder can not be revoked except in the manner and for the causes prescribed in the statute. The holder may invoke the general rules of law for the protection of property in any proceeding having for its object the forfeiture or destruction of the right which the certificate confers.

This suggests the inquiry as to how far the brewing company or its property is liable for the acts of Stevens. It does not appear that the relation of principal and agent existed between them. The company permitted him to use the certificate to do business at a designated place, and in compliance with it. There is nothing in the record to show that they intended, or authorized its use, in any other than a lawful way. It may be that for any violation of law committed by him at the place designated the

company or its property might be responsible. But if he started the liquor business at some other place, or at several other places, he would then be engaged in something wholly disconnected from the business which the certificate authorized. As to the business so disconnected he was simply acting without license, and he alone and not the company is responsible for the consequences. On the other hand, if the delivery of the beer to the public on the ground where games of ball were being played, at places other than the precise location specified in the certificate, was incident to and part of the business which might be carried on under it, then there was no violation of the law by any one. This was the construction which the learned court below gave to the transaction, and as we think correctly. The testimony tended to show that there was a bar on the premises at the location named, but when games were being played on the grounds kegs of beer were placed at other localities; waiters would take the orders of spectators on the various stands through the grounds and bring these orders to men in charge of the kegs, who would furnish them glasses of beer to be delivered to the customers. The waiters on receiving the beer would give checks or tickets for the beer taken, for which they were held responsible, and would collect money for their sales from the customers. The business of trafficking in liquors, authorized by the certificate in a park or upon public grounds where people congregate on special occasions, comprehends something more than the right to sell over a bar at a designated point to such persons as go to the bar to be served. It fairly includes the right of the holder to distribute liquors in the glass by waiters to the patrons of the public place where the bar is located. The regulations of the place may provide for seating the public upon stands and other convenient places, and restrict them from access to the whole grounds. In such cases it would seem to be reasonable to assume that a person authorized to sell liquor to the public frequenting the place should have the right to reach the public from his bar on the grounds through waiters employed to distribute to the patrons of the place what he was authorized to sell and deliver. The license covers not only the right to sell over a bar, but whatever else is fairly included in or incidental to the business authorized. The proof was, therefore, open to the construction given to it by the court below, and since the facts have all been found against the commissioner no question of law is presented by the appeal.

But there is another and, as it seems to me, very conclusive answer to this appeal. We have seen that the privilege conferred by the certificate is a property right. The holder can not be held to have forfeited this right until a case is made which answers all the requirements of the statute. The thirty-fourth section of the act defines the cases when the certificate is forfeited in the following language: "Any corporation, association, copartnership or person who shall * * * violate the provisions of this act by trafficking in liquors contrary to the provisions of section eleven * * * shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not more than five hundred dollars or by imprisonment in a county jail or penitentiary for a term of not more than one year, or by both such fine and imprisonment, and shall forfeit the liquor tax certificate, and be deprived of all rights and privileges thereunder, and of any right to a rebate of any portion of the tax paid thereon, and such certificate shall be surrendered to the officer who issued it, or to his successor in office who shall immediately forward the same to the State Commissioner of Excise for cancellation." It is very evident that the forfeiture of the certificate is a part of the penalty for all infractions of the law comprehended in this section, and follows only in cases where there is a judgment of conviction. A party can not be subjected to a forfeiture of his rights of property upon a summary investigation before a judge or magistrate, but only upon an indictment or criminal charge conducted according to the rules governing criminal procedure, and after a conviction by a jury. The power to fine and imprison, and to forfeit the certificate, depends upon the same condition, and that is the conviction of the offender.

In this case the commissioner is seeking to do two things: (1) To convict some one of a criminal infraction of the law before a judge at Special Term, and (2) to have the certificate of the brewing company forfeited as the result of such conviction. It is quite clear that the statute does not authorize any such proceeding. The twenty-eighth section of the act provides simply for a proceeding to revoke a certificate granted to a party not entitled to receive or hold it, or upon false representations. Any other construction of the statute would present this anomaly: the holder of a certificate could be deprived of the right conferred by it through a forfeiture summarily adjudged, and afterwards be acquitted by the jury upon a trial of the charge in the regular

way, and thus we would have the case of a person suffering the penalty for an offense of which he was adjudged to be innocent.

In this case there is no claim that the party procuring the certificate was not entitled to receive or hold it at the time it was delivered. The claim is that by a subsequent violation of the law, covered by the prescribed penalties, it was forfeited. If in this case Stevens was trafficking in liquors contrary to the statute, he was liable to criminal prosecution, and if convicted the same question would then arise that has been presented before, and that is whether the certificate of the company could be forfeited for his wrongful act committed, so far as appears, without its consent or knowledge. It has been held that under such circumstances the holder of the license can not be made to suffer even for the unlawful act of his bartender, though the latter had been duly convicted. (*People ex rel. Friel v. Commissioners*, 2 App. Div. 89.)

It is quite apparent, therefore, that the courts below were right in dismissing this proceeding, and the order from which the appeal is taken should be affirmed, with costs.

All concur (MARTIN and VANN, JJ., on first ground stated in opinion), except BARTLETT, J., not voting.

Order affirmed.

Supreme Court, Suffolk Special Term, November, 1899. Unreported.

In the Matter of the Petition of HENRY HOLMES to revoke a liquor tax certificate of ISAAC HENSCHEL.

SMITH, J.:

There is only one dwelling house, belonging to John M. Ruckert, within 200 feet of the saloon of the holder of the tax certificate. The building claimed to be the second dwelling house of Mr. Ruckert is an outhouse connected with the main dwelling and adapted for use in connection therewith and beyond all doubt built for that purpose. It is not a building used as a dwelling or capable of use for a dwelling, within the meaning of the Liquor Tax Law.

The liquor tax certificate referred to in these proceedings must be, therefore, revoked and cancelled, with \$30 costs to the petitioner.

Supreme Court, Ulster Special Term, November, 1899. Reported.
29 Misc. 443.

MOSES McMULLEN, Plaintiff, v. ELMER E. BEREAN, as Town Clerk
of the Town of Marlborough, Ulster County, New York,
Defendant.

Liquor Tax Law—A petition for the resubmission of local option must be filed with the county clerk twenty days before the general election, where the town meeting is held on the same day.

Under section 16 of the Liquor Tax Law, as amended by chapter 398 of the Laws of 1899, a petition for the resubmission to a town meeting of the questions as to local option, must be filed with the county clerk twenty days before the general election, where the town meeting is appointed to be held on the same day, as in such case he is "the officer charged with the duty of furnishing ballots for the election." After that time has passed the county clerk has no right to receive and file the petition. A timely filing with the town clerk affords in such case no authority for the submission of the questions to the electors.

ACTION to restrain defendant, as town clerk, from printing and distributing certain ballots submitting to the electors of the town, at the general election to be held November 7, 1899, the four questions authorized by section 16, chapter 398, Laws of 1899.

Eldoras Dayton (Howard Chipp, of counsel), for plaintiff.

A. T. Clearwater, for defendant.

BETTS, J. This is an action brought to restrain the defendant as town clerk of the town of Marlborough, Ulster county, from printing and distributing certain ballots submitting to the electors of said town at the general election to be held November 7, 1899, the four questions authorized by section 16, chapter 398 of the Laws of 1899, known as the local option clause of the Liquor Tax Law.

A preliminary injunction was granted returnable at a Special Term of the Supreme Court at Newburgh to-day, but by stipulation of parties the matter was brought on before this court at Special Term.

It is claimed in behalf of the plaintiff: *First*, that the petition for the submission of this question was not filed with the county

clerk as required by the statute; *second*, that the petition was not filed with the town clerk within the time specified by the statute, and *third*, that the petition filed with the town clerk was not properly signed and acknowledged.

The question is submitted on meagre papers and hasty argument, and, as the election is only two days distant, a prompt decision is required.

The plaintiff is an elector, a hotelkeeper and taxpayer in said town and claims that he will be injured as a taxpayer and in his business by the submission of this question to a popular vote if the result of such vote should be to decide against the trafficking in liquors in said town.

His papers disclose that several persons beside himself are engaged in trafficking in liquors in that town. The inevitable result of an illegal or unwarranted submission of this question to the electors if decided adversely to plaintiff would be a multiplicity of law suits, while its proper submission would of necessity be acquiesced in, no matter what the result.

Although it does not clearly appear from the papers, the fact seems to be conceded that the question of "local option" under the Liquor Tax Law was submitted two years ago to the voters of the town of Marlborough and this is an application under the Liquor Tax Law for the second submission thereof. The result of the vote thereon at that time must also have been adverse to the cause represented by these petitioners.

The petition in question was filed with the town clerk of the town of Marlborough on October 5, 1899. So far as appears from the papers before me it has never been filed with the county clerk of Ulster county, although it appears from the affidavit of the defendant that said petition was sent to the county clerk on November 2, 1899. This was only five days previous to election. The principal question argued before me was as to whether this petition should be filed with the town clerk or the county clerk.

Section 16 of chapter 112 of the Laws of 1896, entitled "An act in relation to the traffic in liquors * * * and to provide for local option," etc., as amended by chapter 312 of the Laws of 1897, and as further amended by chapter 398 of the Laws of 1899, provides in reference to this question as follows: "The same questions shall be again submitted in the same way at the town meeting held in every second year thereafter, provided the electors of the town to the number of ten per centum of votes cast at

the next preceding general election shall, by a written petition, signed and acknowledged by such electors before a notary public or other person authorized to take acknowledgments or administer oaths and filed twenty days before such town meeting with the officer charged with the duty of furnishing ballots for the election, request such submission."

Apparently this is the first case arising under this division of this section of the statute as my attention has not been called to any decision thereunder, nor have I been able to find any.

It has been held that this provision of the Liquor Tax Law is to be construed in connection with the Election Law. *People ex rel. Hovey v. Town Clerk*, 26 Misc. Rep. 220.

The board of supervisors of Ulster county has provided, under the Laws of 1898, that town meetings in this county shall hereafter be held on the same day as the general election.

Section 82 of the General Election Law provides as follows:

"Form of ballot for questions submitted.—Whenever the adoption of a constitutional amendment or any other proposition or question is to be submitted to the vote of the electors of the State or of any district thereof, a separate ballot shall be provided by the same officers who are charged by law with the duty of providing the official ballots for candidates for public office. Such ballots shall comply with the requirements for official ballots for candidates for public office, in so far as such requirements are applicable thereto."

Section 86 of the General Election Law provides as follows:

"Officers providing ballots and stationery.—The county clerk of each county * * * shall provide the requisite number of official and sample ballots, cards of instruction, * * * for the proper conduct of the election, and the canvass of the votes, for each election district in such county * * * for each election to be held thereat, *except* that when town meetings, city or village elections and elections for school officers are not held at the same time as a general election the clerk of such town, city or village, respectively, * * * shall provide such official and sample ballots and stationery for such election or town meeting."

It is desirable always that the electors of a town should be given the fullest opportunity of expressing their wishes upon any question which is authorized by law to be submitted to them, and courts are reluctant to restrain such action on their part.

When, however, as in the present case, the law clearly points

out the way in which proceedings must be taken by those desirous of ascertaining the will of the electors of the town the plain provisions of the law must be complied with. It is not for the courts to commend or condemn the statute but to enforce its provisions. It is plain from the reading of this statute — plain from the reading of the several statutes so briefly quoted — that this petition should be filed with the county clerk at least twenty days prior to the day of general election. This has not been done. An attempt now by the town clerk to submit this question to the electors of Marlborough would be unauthorized and unlawful.

This requirement of the statute that this petition shall be filed with the county clerk twenty days before election is mandatory, must be complied with, and after the time has passed, a county clerk has no right to receive and file it. *Matter of Cuddeback*, 3 App. Div. 103.

This presents a different question from that which would be presented if this were an attempt to restrain the printing and distributing of tickets for a town or other officer as the statute fully provides for a special town meeting if such is desired by the requisite number of electors of the town to pass upon the question of "local option." No one is disfranchised by this injunction nor can they be as a result of this action brought by the plaintiff.

The view of the law I take as to the proper place for filing this petition makes it unnecessary for me to pass on the other propositions submitted in support of continuing this injunction.

An order, therefore, may be handed up continuing the injunction during the pendency of this action.

Ordered accordingly.

Supreme Court, Clinton Special Term, November, 1899. Reported.
29 Misc. 463.

THE PEOPLE ex rel. THE TOWN OF PLATTSBURGH, Relator, v.
ANDREW WILLIAMS, as County Treasurer of the County of
Clinton, Respondent.

Liquor Tax Law—The poor fund of the town of Plattsburgh has no right
to the State's share of excise moneys.

The legislation, had in regard to devoting the excise moneys of the town of Plattsburgh to its poor fund, only entitles that fund to so much of said moneys as remain after deducting therefrom the one-third part thereof, appropriated by the Liquor Tax Law of 1896 to State purposes.

APPLICATION for a writ of mandamus.

David H. Agnew, for relator.

P. W. Cullinan, for respondent.

KELLOGG, J. Application is made by the relator for a writ of mandamus to compel the treasurer of Clinton county to pay over to the town of Plattsburgh the liquor tax money received from licenses issued in the town of Plattsburgh since May 1, 1899.

This application is based upon the wording of an act passed in 1898 (Chap. 135), to amend an act of 1894 (Chap. 471), relating to the same subject. In 1894 all the excise money paid for licenses in the town of Plattsburgh went to the treasurer of the board of alms, as a poor fund. The amendment follows in this respect the wording of the old law disregarding the provisions of the Liquor Tax Law, chapter 112, of the Laws of 1896, by which one-third of such money was to be paid by the county treasurer to the State.

I cannot think that the Legislature intended this amendment of 1898 to divert from the State Treasury that one-third, while all other towns in the State must contribute one-third for State purposes. This would be such a discrimination in favor of the town of Plattsburgh as to excite grave question as to its cause. There appears to have been some blundering in the use of words in the amendatory act. The fair, and I think the proper construction, must confine the meaning of this amendment to such

money as the State does not, by the Liquor Tax Law, appropriate to itself for State purposes.

The application is, therefore, denied, but without costs.

Application denied, without costs.

Supreme Court, Monroe Special Term, November, 1899. Reported.
29 Misc. 465.

THE PEOPLE ex rel. ELMER L. SMITH, Relator, v. JOHN B. HAMILTON, as County Treasurer of Monroe County, N. Y., Respondent.

Liquor Tax Law—The court can not review, on certiorari, the validity of an election as to local option.

A person denied a liquor tax certificate, as the result of a vote sufficiently certified as having been adverse to local option, may, by certiorari, review the action of the county treasurer in refusing to issue him a certificate; but the Liquor Tax Law of 1896 affords the court no power to inquire, upon such a writ, into the validity of the election itself, nor to require the town clerk and election officers to make a return of their proceedings at the election.

CERTIORARI to review the refusal of the respondent to grant a liquor tax certificate.

George D. Forsyth, for relator.

P. W. Cullinan, for respondent.

NASH, J. The Appellate Division of this department holds that a certificate, in the form of the one set out in the return of the county treasurer, is sufficient information of the result of the vote at the election in the town on the question of local option for him to act, and that the contents of the certificate authorized the denial of a liquor tax certificate to an applicant from the town in which the election was held. But the relator has set out in his petition facts tending to show illegality in the election held in the town of Ogden on the question of local option, and offers to prove the facts set up in his petition, and it is urged that the

justice in this proceeding has the power, and is required to examine into the question raised as to the validity of the election.

I am unable to find authority in the statute for anything more than to inquire into and review the act of the officer in refusing the certificate. The statute provides that when any officer charged with the duty of issuing a liquor tax certificate under the provisions of the act shall refuse to issue the same, he shall indorse upon the application therefor, or attach thereto, a statement of his reasons for such determination, and furnish to the applicant a copy of such statement. Such applicant shall have the right to a writ of certiorari to review the action of such officer. If such justice shall, upon the hearing, determine that such application for a liquor tax certificate, or for a transfer, has been denied by such officer without good and valid reasons therefor, and that under the provisions of this act, such liquor tax certificate should be issued, such justice may make an order commanding such officer to grant such application, and to issue a liquor tax certificate to such applicant upon the payment of the tax or fee therefor.

It will be seen that by the provisions of the statute the right to the writ is given simply to review the action of the officer. The only authority the justice has is to determine whether the liquor tax certificate has been denied by such officer without good and valid reasons therefor. The writ issues to the officer, and his proceedings are to be reviewed, nothing further. The justice sits as such, and not as a court with inherent power to bring papers and witnesses before it. There is no power given to the justice to direct the writ to issue to the town clerk or the election officers, requiring him or them to make a return of his or their proceedings, nor is there any power given to the justice granting the writ to inquire into the validity of an election. These are powers which must be given in express terms, and cannot be inferred from phrases culled from the statute or separated from the context.

The writ must be quashed.

Writ of certiorari dismissed, with ten dollars costs.

Supreme Court, Ontario Special Term, November, 1899. Reported.
29 Misc. 524.

Matter of the Petition of HENRY H. LYMAN, for an Order Revoking and Canceling Liquor Tax Certificate No. 27,304, Issued to MAGGIE VEEDER.

Liquor Tax Law—Presumption that a certificate holder knew that the law was being violated, on her premises.

The fact that a woman, owning a hotel and conducting it by herself or by her husband as her agent, had given orders to him, and to her servants, not to sell beer or liquors on Sunday in violation of the provisions of the Liquor Tax Law of 1896, can not protect her against the consequence of such illegal sales, where it appears that either she, or her husband, were constantly on the premises, and in or about the kitchen through which the beer or liquors were carried, and must therefore have known of the illegal sales.

PROCEEDINGS under the Liquor Tax Law for the revocation and cancellation of a liquor tax certificate.

Royal R. Scott, for petitioner.

Huson & Dwelle, for respondent.

WERNER, J. The petition herein, after alleging the formal facts relating to the issuance of said certificate to the respondent, proceeds to charge the respondent with several distinct violations of the Liquor Tax Law. The alleged violations consist in the sale of liquors on each of four Sundays in the months of June and July, 1899, by the bartenders, Ackley and Polmenteer, and of sales of liquors made by said bartenders to one Jesse Hinckley, a minor under the age of eighteen. The formal allegations of the petition are admitted by the answer and the alleged violations of the Liquor Tax Law are denied.

The evidence herein is not as satisfactory as might be, but it is not unusual in cases of this character. The petitioner's case is made out by the evidence of witnesses who are confessedly friendly to the respondent, as the evidence submitted to the court clearly shows. That sales of liquor were made upon the respondent's premises upon the Sundays in question in the manner

described and in violation of the provision of said statute is clearly established. That liquor was sold to Hinckley and that he is a minor is clearly proven. But it is also shown that he misrepresented his age to those who sold him liquor. The respondent denies all knowledge of the illegal sales referred to, and testifies to explicit orders given to her husband and her employees not to furnish liquor to anyone on Sundays except to guests of the hotel. In this testimony the respondent is corroborated by the admissions and statements of the other witnesses. This is, however, the kind of testimony which is to be expected in such proceedings as these from a respondent charged with a violation of the law, and we must, therefore, look through the testimony to the circumstances of the case for the purpose of determining whether it is probably true or not.

As we have already stated, there is no good reason for doubting the truth of the evidence that sales of liquor were made upon these premises at the time and in the manner described by the several witnesses for the petitioner.

If such sales did actually take place, it is difficult to see how it could have been without the knowledge of the respondent. She testifies that she was constantly upon the premises and usually in and about the kitchen through which the beer and liquor, sold under the circumstances adverted to, was carried. If she was there she must have known of what was going on. But it may be suggested that she was not there all of the time. But it is a sufficient answer to this that her husband was her acknowledged agent. He was in charge of the premises during her absence, and worked in conjunction with her in the management of said hotel when she was present. It may be added, moreover, that the law casts upon the holder of a liquor tax certificate the duty of doing something more than the mere giving of instructions to obey the law. He is required to be active, diligent and watchful to see that his orders are obeyed.

The evidence submitted to us seems to warrant the inference that if the respondent did give orders not to sell liquors on Sundays, except to guests of the hotel, she was not as careful to see that these orders were obeyed as the law required. As we have suggested, we have not the advantage of having the witnesses before us nor the benefit of an opinion of the referee before whom the witnesses appeared. This naked report of the evidence constrains us to think that the evidence not only justifies but

requires the issuance of an order revoking the liquor tax certificate, and it is, therefore, so ordered.

Ordered accordingly.

Second Appellate Department, November, 1899. Reported, 44 App. Div. 507.

In the Matter of the Petition of HENRY H. LYMAN, State Commissioner of Excise, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate No. 29,661, Issued to RAFFAELE SALATINO, Respondent.

Liquor tax certificate—Forfeited only upon conviction of a violation of the Excise Law.

A liquor tax certificate can be forfeited, for a violation of the Excise Law by the licensee, only upon conviction for such offense; in the absence of such conviction a proceeding for the revocation of the certificate can not be maintained.

APPEAL by the petitioner, Henry H. Lyman, State Commissioner of Excise, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 12th day of May, 1899, denying his application for an order revoking and canceling the liquor tax certificate of Raffaele Salatino.

This proceeding was begun upon the ground that the respondent, having a license which only permitted him to sell liquors, no part of which was to be drunk upon the premises, violated the Excise Law by selling liquor to persons who drank upon the premises. It did not appear that any criminal proceedings had been instituted against the respondent.

W. E. Schenck, for the appellant.

Louis J. Somerville, for the respondent.

PER CURIAM. The only ground on which it was sought to have the respondent's license revoked was that he had violated the Excise Law in selling liquor to be drunk on the premises without a license or liquor tax certificate authorizing such sale. In

Matter of Lyman (160 N. Y. 96) the Court of Appeals has held that a liquor tax certificate can be forfeited for a violation of law by the holder only upon conviction for such offense, and not in a summary investigation before a justice of this court or a magistrate. It follows that this proceeding cannot be maintained.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

First Appellate Department, November, 1899. Reported. 44 App. Div. 635.

In the Matter of the Petition of LEVI L. KESSLER to Revoke and Cancel Liquor Tax Certificate No. 5202, Issued to PATRICK CASHIN.

Order affirmed with ten dollars costs and disbursements on opinion of RUSSELL, J., in court below.

Court of Appeals. Reported. 161 N. Y. 119.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Appellant, for an Order Revoking and Cancelling Liquor Tax Certificate No. 10,320, Issued to MALCOM BREWING COMPANY, Respondent.

1. Motions for reargument.

It is not the usual practice of the Court of Appeals to permit rearguments for the purpose of correcting some error in the reasoning of the court as expressed in the opinion, when it is admitted that the decision itself is correct.

2. Forfeiture of liquor tax certificate.

The question whether a forfeiture of a liquor tax certificate can only follow a criminal conviction, discussed in opinion reported 160 N. Y. 96,

is open for further discussion whenever it shall be necessary to the disposition of an actual controversy; and, in such case, the court will not regard itself concluded by what is stated in that opinion.

(Submitted November 20, 1899; decided November 28, 1899.)

MOTION for reargument of case reported in volume 160, New York Reports, at page 96.

Mead & Stranahan, for appellant, for motion.

J. F. Bullwinkel, for respondent, opposed.

O'BRIEN, J. The counsel for the commissioner of excise have applied for the reargument of this case. The motion papers seem to admit that the decision is right, and the only purpose of the motion is to correct some errors that it is said inhere in the reasons upon which the decision was based, and to show that so far as the opinion asserts that the right to revoke a tax certificate depends upon a criminal conviction, it is based upon an erroneous construction of the statute.

It is not the usual practice to permit rearguments in this court for the purpose of correcting some error in the reasoning of the court as expressed in the opinion, when it is admitted that the decision itself is correct. There are doubtless many cases where a reargument might be asked if that practice was adopted. But it is stated in the moving affidavits and not denied, that upon the argument of the case in this court the appellant did not appear to argue the case, but submitted his points, and that the counsel for the commissioner failed to notice the objection that a forfeiture of a tax certificate could only follow a criminal conviction, and, consequently, omitted to present any argument or authorities on that subject. It is further stated that this construction of the statute, if sustained, will greatly embarrass the commissioner in the administration of the law.

In view of these considerations, we think that it is only fair to the commissioner to say that with respect to the point upon which he desires to present further argument we ought to regard the question as still open for further discussion whenever it arises in an actual controversy presented, so that in a case involving the same question coming here we will not regard ourselves concluded by what has been stated in the opinion. It will then be open to the counsel for the commissioner to make such argu-

ments on that point as he may be advised. This disposition of the motion for a reargument avoids the necessity for a rehearing in a case which it is admitted has been rightly decided, without at the same time foreclosing further discussion on the question referred to, whenever such discussion shall be necessary to the disposition of an actual controversy.

The motion for a reargument, should, therefore, be denied, but without costs.

All concur.

Motion denied.

Supreme Court, New York Special Term. Reported N. Y. L. J.
December 12, 1899.

In the Matter of the Application of TOBIAS SANDERS to Revoke
the Liquor Tax Certificate of DELIA MAHONEY.

GILDERSLEEVE, J. This is an application for the revocation of a liquor license under chapter 312 of the Laws of 1897, on the ground that material statements in the application were false, *i. e.*, that Delia Mahoney was the only person interested or to become interested in the business carried on under the certificate applied for. There is a sharp issue of fact presented, which I do not think should be decided on conflicting affidavits. Let an order be handed up referring the matter to a referee in aid of the conscience of the court.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
December 20, 1899.

HENRY WARREN *v.* ANTHONY R. WEIR.

GILDERSLEEVE, J. The plaintiff, as a citizen and taxpayer, applies for an injunction under section 29 of chapter 112 of the Laws of 1896, as amended by subsequent acts, restraining defendant from trafficking in liquor, on the ground that he has no certificate and is selling liquor in violation of section 31 of said act. The defendant denies the allegations of the petition, swears he has a certificate and demands a bill of particulars of the alle-

gations of the petition concerning the names of the persons to whom the liquor was sold, as alleged in the petition, and by whom it was sold, and the dates of such sales. It seems to me that the issue of fact raised by the papers herein should be sent to a referee in aid of the conscience of the court, instead of being decided on conflicting affidavits. As to the demand for a bill of particulars, the petition states that, at No. 571 Eighth avenue, on the 20th day of June, 1899, between one and five in the morning, and on Sunday, May 7th, 1899, and on each and every day thereafter between one and five in the morning, defendant, by his agents and employees, sold liquor, &c., to divers persons, male and female; and that defendant did and does unlawfully traffic in liquor, contrary to the provisions of section 31 of said statute. The names of defendant's employees must be better known to defendant than to the plaintiff. As to the names of those who are alleged to have bought liquor in No. 571 Eighth avenue, it seems to me that it would be requiring plaintiff to disclose his evidence were the court to direct him to give the names of such persons, assuming that he knows them. Furthermore I think the dates and hours are given with sufficient definiteness. The plaintiff should, however, give the name of any place other than No. 571 Eighth avenue, if he claims there are any, where defendant is alleged to sell liquor without a license. Let an order be handed up referring the matter to Robert P. Noah, Esq. Settle order on notice. No costs of motion.

Supreme Court, Kings Special Term, December, 1899. Reported.
29 Misc. 682.

HENRY NIELAND, JR., Plaintiff, *v.* MICHAEL F. McGRATH and
HARRY W. MICHELL, as Spec. Deputy Comm'r of Excise for
the County of Kings, Defendants.

Liquor Tax Law—Revocation proceeding must be brought against the actual holder of the certificate.

Where a citizen seeks a revocation of a liquor tax certificate, the proceeding must be brought against the person who is, at the time, the holder thereof.

Where it is wrongly brought against the original holder, there is no authority for bringing in his duly constituted assignee; and the proceeding must be dismissed.

THIS is a proceeding instituted under section 28 of the Liquor Tax Law (Laws of 1896, chap. 112) to revoke the certificate issued to Michael F. McGrath, which, upon his application, was transferred to a different place and subsequently transferred to his wife.

The defendant McGrath filed an answer setting up the transfer of the certificate to his wife, of which fact the petitioner had no knowledge at the time the proceeding was instituted, and thereupon a motion was made to bring in the wife as party-defendant in the same suit, on the ground that she had knowledge of the whole transaction.

Foley, Wray & Taylor, for plaintiff.

GARRETSON, J.: The proceeding may be brought against the holder of the certificate. Liquor Tax Law, § 28, subd. 2. At the time this proceeding was instituted Elizabeth McGrath was the holder of the certificate by assignment from Michael, consent thereunto having been given by the deputy excise commissioner, upon alleged compliance with the provisions of section 27, *id.* The right of Elizabeth to hold the certificate and the liability, if any, for a revocation and cancellation thereof, is dependent upon compliance by her with the requirements for the making and filing of a new application and bond as upon an original application. *Id.*, § 27. The statements made by Michael in his application would seem to be immaterial. He is no longer a party in interest, and is estopped by the assignment made by him from claiming any right to the certificate. There is no authority for bringing in Elizabeth as a party to this proceeding. The court may not do this under any of its general or equitable powers or by analogy to the procedure in an action. The proceeding is penal in its nature and the provisions of the statutes in respect thereto must be at least substantially followed, if not strictly complied with.

The motion to dismiss the proceeding must be granted because not brought against the holder of the certificate.

Motion granted with ten dollars costs.

Supreme Court, Onondaga Special Term, December, 1899. Reported.
30 Misc. 164.

THE PEOPLE ex rel. JAMES M. CAFFREY, Relator, *v.* THOMAS MOSSO et al., as Inspectors of Election in various Districts of the Town of Volney, Oswego County, New York, and WILLIAM P. HILLICK, as Town Clerk of said Town of Volney, Defendants

Liquor Tax Law—Illegal submission of local option—Remedy.

The first and last, of the four questions which are to be submitted to town electors upon the question of local option, are related to each other, and where the fourth question as printed, omits the final clause required by statute, "if the majority of the votes cast on the first question submitted are in the negative," the variation is material and the election is void.

The remedy of a party aggrieved is not by mandamus, to compel the inspectors to reconvene and reject the ballots upon which the fourth question was not printed in the manner required by statute, but there must be a new special election, at which all four questions must be submitted again.

APPLICATION for a writ of peremptory mandamus commanding the above-named inspectors to reconvene and recount all of the proposition ballots returned as cast and counted by them on excise questions 1, 2, 3 and 4, in the recent election in said town, and to reject as void in their canvass all ballots upon which excise question number four is not printed as required by section 16 of the Liquor Tax Law, and to make their amended return accordingly, etc.

John W. Hogan and Frederick G. Spencer, for relator.

S. B. Mead, for defendant Hillick.

Charles G. Baldwin and Arvin Rice, for defendants Webb and others.

HISCOCK, J. At the election held in and for the town of Volney, county of Oswego, upon November 7, 1899, the attempt was made under the provisions of the Liquor Tax Law, and especially section 16 thereof, to have the inhabitants of said town vote upon the question of selling liquors in the various manners prescribed by law in said town. This controversy arises over the form in which question number four, enumerated in that section, was

printed upon the ballot and submitted to the votes of the inhabitants. This application is founded upon the claim and theory that said question was improperly printed upon the ballots; that said ballots as to that question at least were void, and should not have been counted or returned by the inspectors.

I will consider first whether the question under consideration was properly printed upon the ballots and submitted to the voters. Section 16 provides that upon the face of the ballot to be voted at such town meeting, by all persons who may legally vote thereat, "shall be printed the following questions submitted." The first question relates to the selling of liquors to be drunk on the premises where sold. The second question relates to selling liquors not to be drunk on the premises where sold. The third question relates to selling liquor as a pharmacist on a physician's prescription. The fourth question is the one under consideration, and the language of the statute is, "Selling liquor by hotel keepers: Shall any corporation, association, copartnership or person be authorized to traffic in liquors under subdivision one of section eleven of the liquor tax law, but only in connection with the business of keeping a hotel in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?"

At the election in said town in November, this fourth question was printed upon the ballots as follows: "Selling liquor by hotel keepers.—Shall any corporation, association, copartnership or person be authorized to traffic in liquors under subdivision one of section eleven of the liquor tax law as a keeper of a hotel in the town of Volney?" The last wording actually employed upon the ballots was that of the statute before the amendment of the law of 1897, which provided for the form of question first above quoted.

The vote upon the propositions submitted at the election in question was

	Number.	Yes.	No.	Blank.
Proposition	1	493	607	262
“	2	460	586	241
“	3	591	453	241
“	4	525	544	196

The language of the statute prescribing the form in which these questions shall be printed upon the ballots is mandatory,

and, I presume, it will be conceded that any material difference between the form dictated by the statute and that employed upon the ballots, would be fatal. The only question is whether the variation in the form of question number four as used upon the ballots from the form prescribed by the statute, is a material one. I think it is. Beyond any doubt the same result could be attained by a voter employing the forms of questions printed on the ballot which was submitted to him at the election in Volney that could have been attained if the fourth question had been printed upon the ballot in the form prescribed by the statute. He could vote "No" upon question number one and "Yes" upon question number four, and thus, while voting against the general issue of licenses, as covered by question number one, vote in favor of hotel licenses. But the fact that the Legislature saw fit to change the form of question number four in the respect that it did is some evidence upon this question of materiality. One apparent result of making the change was to call more plainly to the mind of the voter the relation between question number four and number one, and to emphasize the fact that he could, by voting "Yes" upon question number four, and "No" upon question number one, favor the selling of liquor by hotels and not by saloons. There may have been other purposes in the changes made by the amendment of the law of 1897, but if the amended form of question did nothing more than I have indicated it could not be disregarded as immaterial.

The inquiry next arises as to how far the defective wording of question number four, and the resulting ineffectiveness of the voting upon that question affects the voting upon the other three excise questions submitted at the same time. And upon this question, I reach the conclusion that if the election is to be regarded as invalid as to the fourth question, it should be so treated as to all of them: Questions number one and four are certainly so related to each other that they should be voted upon at the same time. Questions two and three are closely related to each other, and while not so closely related to questions number one and four as they are to each other, still they form part of one entire system for submitting to the people of a town the question of local option. It might very well be that a voter's choice in voting upon one of the four questions would be affected by his power to vote in a certain way upon others of them; that in order to work out a vote upon the general subject of selling

liquor which would be satisfactory to him, it would be necessary for him to vote upon all of these questions. It is true that this purpose might be answered to some extent by the voters passing upon question number four, and assuming and knowing what the results of an election at a prior date had been upon the other three questions. But this does not strike me as being the purpose or intention of the statute.

The remaining question is whether the relator has sought the proper relief in his application for a mandamus. I do not think he has. My attention has been called to no authority which would enable the inspectors to reject as void the ballots cast at the recent election because of the improper wording already commented upon. Wherever ballots have been cast out and rejected as void under the present election laws, it has been for reasons far different from that urged here as the basis for a mandamus. All of the cases which have been called to my attention which have directed such rejection to be made have been based upon the theory that the ballots were to be treated as marked ballots, or were in such form that they might be made the instruments of fraud, or avoid the provisions of the election law. That is not this case at all. Moreover, the granting of a writ of peremptory mandamus is more or less discretionary, and the general rule is that it will not be granted where there is some other adequate remedy. The Liquor Tax Law itself expressly provides the manner in which such an error as that found here may be corrected. It provides expressly for a special election where the propositions already commented upon have not been properly submitted at an election. In the language of this provision for a new election is also found authority for the opinion above advanced, that all four propositions should be submitted instead of the one in regard to which the error has been made. Even if a writ of mandamus should be granted, as requested by the petitioner, the ultimate effect thereof would be to lead to a new election, and to a proper submission of the questions. Therefore, I think this application should be denied in the first instance, and the correction of the error complained of left to a new election, in accordance with the provisions of the statute.

The application for a writ of mandamus is, therefore, denied, with ten dollars costs.

Application denied, with ten dollars costs.

City Court of New York, General Term, December, 1899. Reported.
30 Misc. 816.

MARKS L. FRANK *v.* ETTA FORGOTSON.

APPEAL from an interlocutory judgment overruling the demurrer of the defendant Etta Forgetson to the complaint and rendering judgment against her, as prayed for in the complaint. The action was brought upon a bond in order to recover the value of a liquor tax certificate, which the defendant, as alleged, had neglected and refused to deliver.

James C. De La Mare, for appellant.

Philip J. Britt, for respondent.

SCHUCHMAN, J.: The complaint alleges a cause of action to recover \$466.66 and interest from October 1, 1897, upon a bond made by both defendants to plaintiff, dated September 15, 1897. The condition of the bond is as follows: "Now, the condition of this obligation is such that if the above named Marks L. Frank shall lose any sum or sums of money by reason of the title to certain goods and chattels vested in him by a certain delivery thereof, and a bill of sale executed simultaneously therewith on the 15th day of September, 1897, by John S. Forgetson, one of the parties to these presents, up to the amount of \$850, or any part thereof, that for such sum of money as shall be lost by said Frank these presents shall be in full force." The bill of sale referred to is annexed to the complaint, which transfers one oak sideboard and all the other goods, chattels, etc., located in the house No. 14 West Thirty-first street, in the city of New York, and more specifically designated in the schedule thereto annexed, "together with all right, title and interest in and to the liquor tax certificate now issued by the State excise authorities for the sale of liquors, etc., in said premises." The schedule annexed to the bill of sale specifies one liquor tax certificate No. 3,866, dated May 4, 1897. The complaint further alleges that the liquor tax certificate referred to was issued to the Imperial Club, or to one J. W. Powers or Eugene Loeb, or both of them, and authorizing the dispensing of liquors, etc., at said place No. 14

West Thirty-first street, between May 1, 1897, and May 1, 1898, and that said tax certificate was of the rightful value of \$466.66 on said September 15, 1897.

To this complaint the defendant, Etta Forgetson, demurred, on the ground that it does not state facts sufficient to constitute a cause of action. By this demurrer all allegations of the complaint are admitted as true. The liquor tax certificate is property. *Matter of Hilliard*, 25 App. Div. 222, affirmed 155 N. Y. 702; *Matter of Lyman*, 160 Id. 100. The appellant maintains that the condition of said bond is meaningless. The bond reads (by omitting a few words unimportant for the decision of the question involved): "Now the condition of this obligation is such, that if the above named Marks L. Frank shall lose any sum or sums of money by reason of the title to certain goods, chattels, vested in him by a bill of sale executed simultaneously therewith on the 15th day of September, 1897, by John S. Forgetson, one of the parties to these presents, up to the amount of \$850, or any part thereof, that for such sum of money as shall be lost by said Frank, these presents shall be in full force and effect, otherwise they become null and void." The "title to certain goods and chattels" means the right to the property and the right of possession thereof, in short, the ownership thereof, and the bond provides that if plaintiff loses any money by reason of not acquiring complete title or ownership thereof by virtue of said bill of sale, then, in that event and to the amount of his loss, is this bond in force and effect; and that was the evident intent of the contracting parties. The fact that the bill of sale and bond were simultaneously executed and delivered confirms this intent. The bill of sale does not purport to convey his (Forgetson's) right, title and interest in and to the liquor tax certificate, but all right, title and interest therein, and in and by the bill of sale Forgetson expressly warranted the sale. *Scranton v. Clark*, 39 N. Y. 220. Forgetson undertook thereby to transfer all the right, title and interest that existed in that piece of property. The presumption is in favor of the legality of the contracts, to wit, bill of sale and bond involved in this action. An agreement will not be adjudged to be illegal where it is capable of a construction which will uphold it and make it valid. *Lorillard v. Clyde*, 86 N. Y. 384-387. A complaint will be deemed sufficient whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative. It will be held

to state all facts that can be implied from the allegations by reasonable and fair intendment. *Sage v. Culver*, 147 N. Y. 241. The complaint in this case sets forth the bond, a breach thereof, and the reasonable value of the tax certificate. These facts are admitted by the demurrer. The complaint is sufficient. Interlocutory judgment affirmed, with costs and disbursements, with leave to the defendant to answer within six days from service of the order, upon payment of costs of this appeal and of the costs in the court below.

FITZSIMMONS, Ch. J., concurs.

Interlocutory judgment affirmed, with costs, with leave to defendant to answer within six days upon payment of costs.

Second Appellate Department, December, 1899. Reported. 46 App. Div. 312.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. EDWARD GING,
Respondent, v. HENRY H. LYMAN, State Commissioner of
Excise, Appellant.

Excise Law—Rebate of license—Population, how determined—Mandamus
—What is presented on an appeal.

An appeal from an order directing the issue of a peremptory writ of mandamus, entered after a trial of the issues raised by the return to an alternative writ of mandamus theretofore issued, brings up for review only such questions as were raised by exceptions taken at the trial.

Semble, that the provision of the Liquor Tax Law (Laws of 1896, chap. 112) providing that if the population of a village was not determined by the last State or National census the license tax shall be fixed at \$100, precludes the court from accepting any other method of determining the population of the village; and that where a person pays \$200 for a certificate authorizing him to traffic in liquors in a village, the population of which was not fixed by the last State or National census, and the county treasurer, acting under the direction of the Excise Department, issues a rebate receipt to him for the excessive payment of \$100, the State Excise Commissioner can not subsequently question his right to payment of the rebate receipt.

APPEAL by the defendant, Henry H. Lyman, State Commissioner of Excise, from an order of the Supreme Court, made at

the Suffolk Special Term and entered in the office of the clerk of the county of Suffolk on the 3d day of July, 1899, directing that a peremptory writ of mandamus issue requiring the defendant to prepare two orders for the payment of the rebate of the relator, Edward Ging, and transmit the order on the county treasurer for two-thirds and the check of the State Treasurer for the one-third of the rebate to the county treasurer of Suffolk county to be delivered to the relator upon the surrender of the said duplicate surrender receipt.

Mead & Stranahan, for the appellant.

Timothy M. Griffing, for the respondent.

WOODWARD, J. In May, 1896, the respondent paid to the county treasurer of Suffolk county \$200 for a liquor tax certificate, numbered 26,251. This certificate was to be used in Greenport, in the said county, and as that village has, in fact, a population exceeding 1,200, the treasurer assumed that the amount collected was proper under the law. It was subsequently discovered, however, that the Liquor Tax Law (Chap. 112 of the Laws of 1896) provided that the population of villages must be determined by the last State or National census, and if the population was not thus determined, the tax should be fixed at \$100. (§ 11.) The respondent, taking advantage of the fact that neither the State nor the National census fixed the population of the village of Greenport, demanded of the county treasurer a return of \$100, that sum being in excess of the amount which could be collected under the law as thus construed. On the 5th day of February, 1897, the county treasurer notified the respondent in this proceeding that, acting under the direction of the Excise Department, the original certificate would be received by him, and a new certificate, covering the same period, would be issued, and that the respondent would be given a receipt for the difference between the \$100 which should have been paid and the \$200 which had in fact been paid. The respondent surrendered his original certificate, took the rebate receipt and a new certificate, and subsequently brought an action to compel the county treasurer to pay the amount of the rebate receipt.

Upon the trial of the action judgment was entered for the plaintiff, and this court, in reversing the judgment, held that the

plaintiff had no cause of action against the county treasurer, his right to recover under the rebate receipt being agreed upon in that instrument, which provided that the rebate sum should be "payable from any excise money hereafter received from said city or town, or in any other manner hereafter legalized," and the Legislature having in the meantime, by chapter 312 of the Laws of 1897, amended the Liquor Tax Law (§ 25) and provided for the payment of these rebate receipts. Having failed to recover from the county treasurer the respondent instituted a proceeding for an alternative writ of mandamus to compel the appellant to issue two orders upon the proper officers for the payment of the rebate certificate held by him, resulting in an order directing a peremptory writ of mandamus to issue. From this order the defendant appeals to this court, urging that it is possible to gather from the last State census that the village of Greenport has more than 1,200 inhabitants; that an enumeration of the inhabitants of Greenport, taken in 1897, under the provisions of the Liquor Tax Law, shows an actual population of 2,239, and that the court should have taken judicial notice of the fact that the population of Greenport was in excess of 1,200 at the time the certificate was issued in 1896; that the payment by the respondent was a voluntary payment, and cannot be properly demanded, etc.

We are unable to discover from the record that any of these questions are properly before this court. The appellant has taken no exceptions to the decision of the court, which states separately the facts found and the conclusions of law. As the proceedings after an issue is joined are the same in a mandamus proceeding as in an action (Code Civ. Proc. § 2082), and as they are governed on appeal by the same rules of law as in case of a judgment (Code Civ. Proc. § 2087), there are upon the appeal from the order no questions before us except such as were raised by exceptions taken at the trial, and none of these are urged upon the attention of the court. We are of opinion, however, that the statute having determined the method of fixing the population of cities, towns and villages, for the purpose of levying the liquor tax, it is not for the courts to accept some other method of determining that question; and the Excise Department having authorized the respondent to surrender his \$200 certificate, taking out a new one for \$100 and giving him a rebate receipt, it is now too late to litigate that question. It is con-

ceded that the respondent had a right to sell liquors under his \$100 certificate. Why, then, the State having agreed to refund the excess payment, should he be denied the right to recover?

The order appealed from should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Fourth Appellate Department, December, 1899. Reported. 46 App. Div. 387.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 12,300, Issued to ERIE COUNTY ATHLETIC CLUB, Appellant.

Jury trial—It can not be demanded on an application to revoke a liquor license.

The holder of a liquor tax certificate is not entitled to a trial by jury before he can be deprived thereof, and subdivision 2 of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112), providing that on an application for the revocation of such a certificate, the proof shall be taken by the court or a referee, who shall report the same to the justice or court, is constitutional.

APPEAL by the Erie County Athletic Club from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 8th day of September, 1899, upon the return of an order to show cause why an order should not be made in this proceeding revoking and canceling a liquor tax certificate, held by the Erie County Athletic Club, on the ground that the holder of said certificate had been guilty of a violation of the Liquor Tax Law, and for that reason had no right to hold said certificate.

The petition of the respondent was presented and filed with the court, and the athletic club filed an answer controverting most of the facts set forth in the petition upon which the order to show cause was granted. The athletic club moved "that the issues herein be sent to a jury for trial."

In the order appealed from is the following language: "Ordered, that said motion for a trial of the issues herein by a jury be and the same hereby is denied."

The order also named a referee to take the proofs of the parties in relation to the allegations of the petition herein, and to report the evidence to a Special Term.

Moses Shire and Edward L. Jellinek, for the appellant.

S. B. Mead, for the respondent.

HARDIN, P. J. Henry H. Lyman, the State Commissioner of Excise, in a petition verified on the 26th day of August, 1899, states that on the 28th day of April, 1899, the Erie County Athletic Club, by its vice-president, made a statement and application in writing for a liquor tax certificate authorizing and permitting it to traffic in liquors under subdivision 1 of section 11 of the Liquor Tax Law (Laws of 1896, chap. 112) at the premises known as No. 359 Washington street in the city of Buffalo, and that that petition was, on the first day of May, presented to Daniel O'Grady, the special deputy commissioner of excise for the county of Erie, together with a bond, and that upon receiving and filing said statement and bond, and upon receipt of the tax, the special deputy commissioner issued to the Erie County Athletic Club liquor tax certificate No. 12,300, permitting it to traffic in liquors under subdivision 1 of section 11 of the Liquor Tax Law (Laws of 1896, chap. 112), at the premises mentioned. The petition avers that the club has been trafficking in liquors under said certificate since the issuing thereof.

The petitioner further alleges that the statement so filed in answer to question No. 13, "May the applicant lawfully carry on such traffic in liquors on such premises?" and to question No. 14, "Was such traffic in liquors actually lawfully carried on in such premises on March 23rd, 1896?" the applicant answered "yes." It is averred that the said statements were material statements and were and are false. It is also averred that the Erie County Athletic Club was not a corporation or association organized in good faith under the laws of the State of New York, as provided for the organization of societies and clubs for social, recreative and similar purposes, and that said club was not lawfully organized and did not, on the 23d day of

March, 1896, traffic in or distribute liquors among its members, and was, therefore, not entitled to receive and is not entitled to hold said certificate.

The petition further avers that the club "was organized and is carried on for the purpose of evading the provisions of the Liquor Tax Law, and for selling liquor to any person or persons, regardless of membership in said club, and is what is commonly known as 'Fake Club.'"

The petition further alleges that the club, "since the issuing of said certificate as aforesaid, has trafficked in liquors with persons other than members of said club, and for that reason is not entitled to hold said certificate."

The petition avers that on the 28th day of July, 1899, and on the 29th of July, 1899, the club, by its officers, sold to two persons named, on each date, two glasses of liquor, to wit, two glasses of beer, to be drunk on said premises, which were then and there drunk on said premises by the persons named.

In the prayer contained in the petition the commissioner asks for an order requiring the club to show cause before the court "why said liquor tax certificate should not be revoked and cancelled for the reasons hereinbefore set forth, and that upon the return of said order an order be made revoking and cancelling said certificate, or for such other or further relief in the premises as may be just."

The answer of the Erie County Athletic Club contained denials of the material allegations stated in the petition.

To support the appellant's contention, that it was entitled to a trial by jury, it asserts that a liquor tax certificate is property of which it cannot be lawfully deprived in a summary proceeding.

In April, 1866, the Legislature passed an act to regulate the sale of intoxicating liquors within the metropolitan police district of the city of New York. That act was considered and construed in *Metropolitan Board of Excise v. Barrie* (34 N. Y. 657). That act contained a provision revoking licenses that had been theretofore granted under the act of 1857, and in the course of the opinion delivered by WRIGHT, J., he said: "It, in terms, it is true, revokes licenses granted under the act of 1857, but that is no encroachment upon any right secured to the citizen as inviolable by the fundamental law. These licenses to sell liquors are not contracts between the State and the persons licensed, giving the latter vested rights protected on general principles

and by the Constitution of the United States against subsequent legislation; nor are they property in any legal or constitutional sense. They have neither the qualities of a contract or of property, but are merely temporary permits to do what otherwise would be an offense against a general law. They form a portion of the internal police system of the State; are issued in the exercise of its police powers and are subject to the direction of the State government, which may modify, revoke or continue them, as it may deem fit. If the act of 1857 had declared that licenses under it should be irrevocable (which it does not, but by its very terms they are revocable), the legislatures of subsequent years would not have been bound by the declaration. The necessary powers of the Legislature over all subjects of internal police being a part of the general grant of legislative power given by the Constitution, cannot be sold, given away or relinquished. * * * But no one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."

In *People ex rel. Beller v. Wright* (3 Hun, 306) a question arose under section 4 of chapter 549 of the Laws of 1873 authorizing the board of excise to revoke the license granted to any person if they should become satisfied that he has violated any of the provisions of the act, and in the course of the opinion which I prepared in that case I said: "The relator was not entitled to a trial by jury. The statute under which he received his license expressly authorizes and empowers the board of excise when 'they shall become satisfied that any such person or persons has or have violated any of the provisions of the act, to revoke, cancel and annul the license of such person.' The license was merely a permit given to the relator, under which he was authorized to sell ale or beer. It did not give him any property or vested right to enjoy the privileges thereof beyond the time when the board should become satisfied that he had violated any of the provisions of the acts of 1857, 1869, 1870 or 1873. The board had no power to inflict a penalty upon him for violation of the law. They were simply authorized to revoke the permit theretofore given him in respect to ale or beer. * * * The board, in issuing licenses and in revoking them, are clothed with power to be exercised in their discretion."

The latter case was approved in the opinion of VAN BRUNT, P. J., in *People ex rel. Welling v. Meakim* (56 Hun, 631). In that case an application was made for a mandamus to compel the

excise commissioners of the city of New York to decide a proceeding before them instituted to procure a revocation of a license to sell liquor, and in the course of the opinion it was said: "In our judgment it was the plain intent of the Legislature, as expressed in this act, that after hearing all the testimony the board, *as a board*, should consider such testimony and thereupon decide by a vote of the commissioners whether the accused person has or has not violated any of the provisions of the act. If such accused person has so violated any of the provisions of the act, the duty to revoke the license is imperative. In that case, to quote the language of the act, 'they *shall* revoke, cancel and annul the license.' And this duty cannot be evaded or the rights of the people trifled with by non-action or silence."

In *People ex rel. Presmeyer v. Commissioners of Police* (59 N. Y. 92) the Court of Appeals held that "The provision of the Excise Law of 1873 (Sec. 8, chap. 549, Laws of 1873) providing for the cancellation, by boards of excise, of licenses granted for the sale of intoxicating liquors is not in contravention of the constitutional provisions preserving the right of trial by jury. (Const. art. 1.) The power to license and to cancel licenses is vested in the Legislature, and the mode and manner in which it shall be done rests in the legislative discretion."

Near the close of the opinion in that case GROVER, J., said: "The counsel further insists that section 8 is unconstitutional, for the reason that it authorizes the conviction of a party of a crime without a trial by jury. But it authorizes nothing more than an inquiry into and determination of the question, whether the party licensed continues to be a suitable and proper person to sell intoxicating liquors, the statute itself determining that a violator of the excise laws, while holding a license, is not such a person. That the power to license the sale of intoxicating liquors and to cancel such license, when granted, is vested in the Legislature, has been determined by this court. (*Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657.) The mode and manner in which this shall be done rests in the discretion of that body."

In *People ex rel. Einsfeld v. Murray* (149 N. Y. 367) chapter 112 of the Laws of 1896, known as the Liquor Tax Law, was held not to be a tax law in the proper sense, "but it is a law enacted under the police power, the exactions of which, although denominated taxes, are imposed for the primary purpose of regulating and controlling the liquor traffic." ANDREWS, Ch. J., in speaking

of the character of the act of 1896, said: "It is radically different in some respects from the excise laws which it supersedes. But the changes are in the administration of the excise system, *and not in its essential character.* * * * The payment of the tax and the giving of the bond are conditions precedent to the right to engage in the business, and the imposition of conditions precedent is the distinguishing test of a license law."

In *Matter of Livingston* (24 App. Div. 51) a proceeding was instituted to revoke a license certificate, and the evidence showed that beyond question one of the statements in the application was untrue and the license was revoked, and in affirming the order unanimously, the court, speaking by WILLIAMS, J., said: "It is said, however, that before the applicant could be deprived of his certificate he was entitled to have a trial by jury under the Constitution; that the certificate was property, and he could not be deprived of such property without due process of law. We have held that these certificates are property. (*People v. Durante*, 19 App. Div. 292.) They were made such by virtue of the provisions of the Liquor Tax Law, *but the Legislature, which gave the certificate the character of property, had power to and did by the same act provide both for their issuance and cancellation, and under what circumstances they should be valid, and when and how they might be revoked.* The character given them as property was subject to all these provisions attached to them when they were created. Applicants take them with all the privileges and subject to all the burdens imposed upon them by the Liquor Tax Law."

Our attention is called to *Colon v. Lisk* (153 N. Y. 188) and we see nothing in the learned opinion of MARTIN, J., delivered in that case which aids the contention of the appellant here. The act there condemned involved the unauthorized confiscation of private property (oysters) for the mere protection of private rights, and is not within the police power of the State. That learned judge in speaking of the police power said: "Under that power persons and property may be subjected to necessary restraints and burdens to secure the general public good. That that power exists is undenied. That it is necessary to the proper maintenance of the government of the State, and the general welfare of the community, must also be admitted. Although it includes everything essential to the safety, health, morals and general good of the public, it is by no means unlimited."

The conclusion was reached in that case that the act of the

Legislature there condemned was not to be "upheld upon the ground that it is within the police power of the State." And it was added: "It is to be observed that the statute does not relate to the health, morals, safety or welfare of the public, but only to the private interests of a particular class of individuals."

We see nothing in that case inconsistent with or out of harmony with the doctrine laid down in *Beer Company v. Massachusetts* (97 U. S. 25). In the latter case it was held: "All rights are held subject to the police power of a State; and, if the public safety or the public morals require the discontinuance of any manufacture or traffic, the Legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience. As the police power of a State extends to the protection of the lives, health and property of her citizens, the maintenance of good order, and the preservation of the public morals, the Legislature can not, by any contract, divest itself of the power to provide for these objects." (See also, *Stone v. Mississippi*, 101 U. S. 814.)

Power to revoke certificates granted under the Liquor Tax Law is conferred upon Special Terms of the Supreme Court, or a justice of that court, and it is made the duty of such justice or of the court to act and to revoke and cancel certificates where the holder has failed to comply, by truthful statements in his application, or otherwise, with the provisions of the law. Evidently the Legislature intended the action to be summary and was designed to furnish a ready and quick remedy for failure to comply with the provisions of the law.

Section 28 of the Liquor Tax Law, as amended by Laws of 1897, chapter 312, provides, in subdivision 2, that at any time after the liquor tax certificate has been granted, any citizen of the State may present a verified petition to a justice of the Supreme Court, or a Special Term of the Supreme Court, of the judicial district in which such traffic in liquors is authorized to be carried on, asking "for an order revoking and cancelling such certificate upon the ground that material statements in the application of the holder of such certificate were false, or that he was not entitled to receive, or is not entitled, on account of the violation of any provisions of this law, conviction for which would cause a forfeiture of such certificate, or for any other reason, to hold such certificate."

The section also provides that such petition shall state the

facts upon which such allegations are based, and thereupon an order shall be granted requiring the holder of such certificate to appear before the Special Term on a day specified.

The section further provides that on the day specified the justice, or court before whom the same is returnable, shall "hear the proofs of the parties, and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition, or appoint a referee to take proofs in relation thereto, and report the evidence to such justice or court."

The practice adopted in this case is in accordance with the provisions of that section. That section further provides that "If the justice or court is satisfied that material statements in the application of the holder of such certificate were false, or that the holder of such certificate was not entitled to receive, or is not entitled to hold such certificate, an order shall be granted revoking and cancelling such certificate."

It becomes the imperative duty of the justice or court to whom the application is made to comply with the terms of the statute.

Proceedings have been instituted in various parts of the State, under the section which we have just referred to, and courts have sustained them. (*Matter of Bradley*, 22 Misc. Rep. 301; *Matter of Livingston*, 24 App. Div. 51; *Matter of Lyman*, 25 Misc. Rep. 638; *Matter of Lyman*, 26 id. 300; *Matter of Bridge*, 36 App. Div. 533, affg. 25 Misc. Rep. 213; *Matter of Place*, 27 App. Div. 561; *Matter of Lyman*, 29 id. 391; *Matter of Lyman*, 28 Misc. Rep. 385; *Matter of Lyman*, id. 278; *Matter of Kinzel*, id. 622.)

This court has, by its action in numerous cases, been committed to the validity of proceedings taken under section 28 of the act, and it seems orderly that it should adhere until the contrary doctrine shall be held by the court of last resort.

Our attention has been called to a dictum in *Matter of Lyman* (160 N. Y. 96), and also to an opinion delivered in response to a motion for a reargument of that case, in which opinion it was said: "We ought to regard the question as still open for further discussion whenever it arises in an actual controversy presented, so that in a case involving the same question coming here, we will not regard ourselves concluded by what has been stated in the opinion. It will then be open to the counsel for the commissioner to make such arguments on that point as he may be advised."

Under the circumstances of the case we deem it orderly to

follow the views which we have heretofore expressed, and to sustain the proceeding now brought before us.

All concurred.

Order affirmed, with costs.

Fourth Appellate Department, December, 1899. Reported. 46 App. Div. 634.

In the Matter of the Petition of JOHN D. CAMPBELL, Appellant,
for an Order Revoking and Cancelling Liquor Tax Certificate
No. 24,279, Issued to WILLIAM F. ROBINETT, Respondent.

APPEAL from an order of the Appellate Division of the fourth department, reversing an order made herein dismissing the proceeding to cancel and revoke upon the ground that the court has no power to grant relief sought.

Shire & Jellinek, attorneys for appellant: The license can be revoked only upon conviction for a violation of the provisions of the statute and the appellant not having been convicted of the violation charged against him in the petition, cannot have his certificate revoked.

L. H. Jones, attorney for Respondent Campbell: The statute states "on account of the violation" and not "on account of the conviction" a certificate shall be forfeited. This proceeding will lie. *Matter of Bradley*, 22 Misc. 301; *Matter of Lyman*, 24 Misc. 552; *Matter of Bridge*, 25 Misc. 213; *Matter of Lyman*, 26 Misc. 300; *Matter of Fall*, 26 Misc. 611; *Matter of Lewis*, 26 Misc. 532; *Matter of Lyman*, 26 Misc. 568; *People ex rel. Bagley v. Hamilton*, 25 App. Div. 428; *Matter of Michell*, 41 App. Div. 271; *Matter of Kinzel*, 28 Misc. 622; *People ex rel. Miller v. Lyman*, 156 N. Y. 407. The power to license sale of intoxicating liquors and to cancel such license when granted is vested in the Legislature. The mode and manner in which this shall be done rests in the discretion of that body. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *People ex rel. Presmeyer v. Commissioner of Police*, 59 N. Y. 92.

William E. Schenck, attorney for O'Grady, Special Dep. Comr. of Excise. *P. W. Cullinan*, of counsel: The police power is inherent in every sovereignty. Every holder of property holds it under the implied liability that its use shall not be injurious to the rights of the community. The right to exercise this police power cannot be alienated, surrendered or abridged by the Legislature. Prentice on Police Powers, p. 15; Cooley on Constitutional Limitations, 572; *Commonwealth v. Alger*, 7 Cush. 84; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; REDFIELD, J., *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140; *Bertholf v. O'Reilly*, 74 N. Y. 509. Under the police power the conduct of an individual and the use of property may be regulated and in cases of great emergency, property may be taken or destroyed and without what is commonly called due process of law. *Matter of Application of Jacobs*, 98 N. Y. 98. The control of the liquor traffic is within the police power of the State. *Beer Co. v. Mass.*, 97 U. S. 25; *Foster v. Kansas*, 112 U. S. 106; *Mugger v. Kansas*, 123 U. S. 623; Prentice on Police Powers, p. 32; *Bertholf v. O'Reilly*, 74 N. Y. 517; *People ex rel. Presmeyer v. Comrs. of Police*, 59 N. Y. 92; *People v. Murray*, 149 N. Y. 367. The present Liquor Tax Law is constitutional. *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367; *Kresser v. Lyman*, 74 Fed. Rep. 765. The police power may warrant destruction of property without any compensation to owner, without having it considered as taken for public use and without violating the constitutional provisions without "due process of law." *License Cases*, 5 How. 588; *Mugger v. Kansas*, 123 U. S. 623; *Beer Co. v. Mass.* 97 U. S. 32; *Fertilizer Gas Co. v. Hyde Park Co.*, 97 U. S. 659; *Stone v. Mississippi*, 101 U. S. 814; *People v. Budd*, 117 N. Y. 1; *Lawton v. Steele*, 119 N. Y. 226. It is not necessary that a criminal conviction should antedate or precede civil proceedings instituted to revoke a liquor tax certificate under sub. 2 of sec. 28 of the Liquor Tax Law when violation upon which proceedings were based occurred after certificate has been obtained. In *re Bradley v. Hall*, 22 Misc. Rep. 301; in *re Lyman v. Belden Club*, 33 App. Div. 640; in *re Lyman v. Dieffenbacher*, 25 Misc. 638; in *re Lyman v. Fagen*, 26 Misc. Rep. 300; in *re Lyman v. Gramery Club*, 28 App. Div. 209; in *re Lyman v. Young Men's Cosmopolitan Club*, 28 App. Div. 127; in *re Michell v. James*, 41 App. Div. 271; in *re Lyman v. Maloney*, 28 Misc. 385; in *re Lyman v. Monahan*, 28 Misc. 408; in *re Kinzel v. Malone*, 28 Misc. 622; in

re Lyman v. Veeder, 29 Misc. 524; in *re Remington v. Wieland*, 41 App. Div. 625. The right to pursue concurrent civil and criminal remedies is recognized in *Presmeyer v. The Board of Commissioners of Police, etc.*, 59 N. Y. 92; *People v. Meyers*, 95 N. Y. 223. When a criminal act is alleged in a civil suit, in a suit that is civil not in form merely, but in its nature and purpose, proof of the criminal act beyond a reasonable doubt is not required to warrant a verdict or decision in favor of party who makes the allegation. 1 *Greenleaf on Evidence*, § 13 a note; *Insurance Co. v. Wilson*, 7 Wis. 169; *Knowles v. Scribner*, 57 Maine 495; *Hoffman v. Insurance Co.*, 1 La. Ann. 216; *Ellis v. Buzzell*, 60 Me. 209; *People v. Briggs*, 114 N. Y. 64; *Wharton on Evidence*, § 1244, 1245 and 1246 and notes.

Order reversed with ten dollars costs and disbursements, and motion granted, with ten dollars costs, upon opinion of HARDIN, P. J., in *Matter of Petition of Lyman v. Erie County Athletic Club*, decided at this term.

All concurred.

Supreme Court, Erie Special Term, January, 1900. Unreported.

In the Matter of the Petition of ROBERT SCOTT to Revoke the
Liquor Tax Certificate of FRANK J. OPPENHEIMER.

APPLICATION to revoke liquor tax certificate, upon the ground of the violation of the provisions of the Liquor Tax Law by the holder.

L. H. Jones, for petitioner.

Joseph P. Schattner, for respondent.

KRUSE, J.: No claim is made on behalf of the holder of the liquor tax certificate sought to be revoked, that the evidence is insufficient to show a violation of the provisions of the Liquor Tax Law, but it is urged on his behalf that the petition is fatally defective in omitting to state that the petitioner is a taxpayer residing in the county. No such requirement is contained in section 28 of the Liquor Tax Law, under which this

proceeding is brought. Subdivision 2 of that section provides that any citizen of the State may institute such a proceeding as this.

The other questions have been decided adversely to the claim of the holder of the certificate by the Appellate Division of this department.

An order may be entered revoking and cancelling the liquor tax certificate, with costs to the petitioner.

Supreme Court, Columbia Special Term, January, 1900. Reported.
30 Misc. 361.

Matter of the Petition of PAUL KLEVESAHN for an Order Revoking
and Cancelling Liquor Tax Certificate No. 37,683 Issued to
EMMA PERRY.

**Liquor Tax Law—New consents necessary where business has been
suspended by operation of law.**

An involuntary suspension of business, caused by operation of law, in a place where the liquor traffic was lawfully carried on on March 23, 1896, renders, upon a new application for a certificate made two years later and after the legal prohibition had ceased, new consents necessary from two-thirds of the owners of dwellings whose nearest entrance is within two hundred feet, measured in a straight line, from the nearest entrance of the said place.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

Samuel B. Coffin, for petitioner.

Egbert Palmer, for respondent.

EDWARDS, J. This is an application for an order revoking and cancelling a liquor tax certificate, upon the grounds that material statements in the application of the holder of the certificate were false, and that she is not entitled to hold the same.

It is alleged in the petition that the respondent's statement, in her application for a certificate, that there were three buildings

occupied exclusively as dwellings, the nearest entrance to which is within 200 feet, measured in a straight line, of the nearest entrance to the premises where the traffic in liquor was intended to be carried on was false; that there were in fact at the time of the making of such statement, seven buildings occupied exclusively as dwellings within the prohibited distance, and that the petitioner had procured and filed the consent of but one of the seven owners, one of the two consents which were filed not being the consent of the owner of the dwelling nor of his duly authorized agent.

These allegations, supported by proofs filed, are not denied by the respondent, who has appeared and interposed an answer setting up that traffic in liquor was actually lawfully carried on in the premises described in the application on March 23, 1896, by Frank Leek, and that such traffic was actually lawfully carried on by said Leek until May 1, 1897, under a liquor tax certificate issued to him by the county treasurer, which expired on said 1st day of May, 1897, when he was compelled to cease the traffic by reason of the vote cast in the town at a town meeting, held in March, 1897, at which a majority of the qualified electors had voted against permitting traffic in liquor in the town. That at a town meeting regularly held in said town on November 7, 1897, the several propositions or questions provided for in section 16 of the Liquor Tax Law were again regularly submitted to the qualified electors of the town, a vote was regularly had upon the same, and a majority of the votes cast, canvassed and counted at said town meeting were for permitting the traffic in intoxicating liquor in the town. That thereafter and on or about November 13, 1899, the respondent made her application to the county treasurer for a liquor tax certificate, and on that day the certificate described in the petition was issued to her.

This presents the single question of law, whether the consents of owners of dwellings, required by subdivision 8 of section 17 of the Liquor Tax Law, are necessary, on an application for a certificate to traffic in liquor under subdivision 1 of section 11, where such traffic was actually lawfully carried on in said premises on March 23, 1896, and there has subsequently been a discontinuance of such traffic during the interval when it was prohibited by the vote of the qualified electors of the town, under section 16 of the said act. Does this compulsory discontinuance of the traffic, for a period of time, relieve the person, on a new

application, from the necessity of procuring and filing the consents of two-thirds of the owners of dwellings within the prohibited district?

The exemption from the necessity of procuring consents of the owners of buildings, given by the statute to persons who were lawfully carrying on the traffic in liquor in the premises when the Liquor Tax Law went into operation, on March 23, 1896, is simply a privilege or protection extended to such persons and their successors so long only as the traffic in liquor is continuously carried on in said premises. While it may be doubted whether this privilege is not restricted to those persons who were engaged in the traffic in the premises when the act took effect it must be regarded as settled that such persons and their successors can claim the benefit of the privilege so long only as the premises are *continuously* occupied for that purpose. Whether the privilege is personal or whether it attaches to the premises, it is lost by a discontinuance of the business for any definite period, and when so lost the consents required by statute must be procured on a new application. *Matter of Ritchie*, 18 Misc. Rep. 341; *People ex rel. Sweeney v. Lammerts*, id. 343; *affd.*, 14 App. Div. 628; *Matter of Bridge*, 25 Misc. Rep. 213; *affd.*, 36 App. Div. 533; *People ex rel. Bagley v. Hamilton*, 25 App. Div. 428; *Matter of Lyman*, 34 id. 390; *Matter of Kessler*, 28 Misc. Rep. 336. In all the cases here cited, except the last, the temporary discontinuance of the business was voluntary, but I am of opinion that an involuntary suspension of business by operation of law does not take the case out of the principle. In *Matter of Kessler*, *supra*, the suspension of business was involuntary. In that case there was a partial destruction of the premises by fire and the sale of liquor therein was necessarily suspended during the three months required to put the premises in proper condition for use. It was there held that such cessation of business, though temporary, was a destruction of the statutory privilege, and upon a new application for a certificate, the consents of two-thirds of the owners of the dwellings within 200 feet were required.

The privilege extended by the statute to those who were actually and lawfully engaged in the liquor traffic on March 23, 1896, "is clearly an exception to the general policy of the law, and, consequently, it is one which should receive a strict interpretation." *People ex rel. Bagley v. Hamilton*, 25 App. Div. 428. In the case at bar the respondent's predecessor in business kept a

saloon in the premises on March 23, 1896. On the expiration of his license, on May 1, 1897, he was compelled to suspend the traffic in liquor by reason of the vote of the electors of the town, prohibiting the sale therein. It was a discontinuance of business by operation of law. When he procured his tax certificate, which permitted him to keep a saloon on the premises, he took it subject to the statute which gave the right to the electors of the town thereafter to prohibit the sale of intoxicating liquor in the town. This was a risk incident to the business in which he engaged, and which he assumed when he procured his tax certificate. The same law which extended to him the privilege of procuring a tax certificate for the traffic in liquor without procuring the consents of two-thirds of the owners of the buildings, provided that that privilege might be destroyed by a vote of the majority of the electors of the town in the manner prescribed by the act. The statute which conferred the privilege conferred on the electors the right to destroy the privilege. This privilege of the respondent's predecessor was destroyed in 1897 by vote of the electors of the town. It was not revived in favor of the respondent more than two years thereafter by the vote of the electors permitting traffic in liquor in the town. There had been a discontinuance of the traffic in the premises for more than two years, and it was the respondent's duty to file with her application the consents required by the statute.

The prayer of the petitioner for the revocation and cancellation of the certificate, issued to the respondent should be granted.

Application granted.

Third Appellate Department, January, 1900. Reported. 47 App. Div. 88.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE TOWN OF PLATTSBURGH, NEW YORK, Appellant, *v.* ANDREW WILLIAMS, as County Treasurer of the County of Clinton, New York, Respondent.

Liquor Tax Law—In the town of Plattsburgh all the excise moneys are applied to the use of the town.

The Liquor Tax Law (Laws of 1896, chap. 112), requiring one-third of the excise moneys collected in a town to be paid to the Treasurer of the State of New York and the remainder to the supervisor of the town, and

repealing "the provisions of any special or local law, grant or charter in conflict with this act," operated to repeal section 3 of chapter 435 of the Laws of 1879, as amended by chapter 471 of the Laws of 1894, a local act providing that all excise moneys collected in the town of Plattsburgh shall be deposited with the treasurer of the poor fund, to be used for the support of the poor of the town, so far as it directs that *all* the excise moneys collected in the town shall be so applied, but leaves it operative as to the two-thirds of the excise moneys which are by the Liquor Tax Law declared to belong to the town.

This provision of the act of 1894, so repealed, was, however, subsequently, in effect, re-enacted by chapter 125 of the Laws of 1898, amending section 3 of the act of 1879, by providing that *all* excise money arising from licenses granted in the town of Plattsburgh shall be deposited with the treasurer of the poor fund of said town, to be expended for the support of the poor of said town, and that the balance, if any, shall be expended in the construction and repair of the highways and bridges of said town and for other town purposes; and which further provides: "All acts or parts of acts inconsistent with the provisions of this act are hereby repealed"—thus appropriating *all* the excise moneys collected in that town to the purposes specified in the amendment, and not merely the two-thirds thereof which the Liquor Tax Law declared to belong to the town.

APPEAL by the relator, The Town of Plattsburgh, New York, from an order of the Supreme Court, made at the Clinton Special Term, and entered in the office of the clerk of the county of Clinton on the 23d day of September, 1899, denying its motion for a peremptory writ of mandamus to Andrew Williams, as county treasurer of the county of Clinton, requiring him, as county treasurer of such county, to forthwith turn over to the town of Plattsburgh, county of Clinton, the sum of \$4,048.13, excise moneys in his hands received from licenses in the said town of Plattsburgh.

David H. Agnew, for the appellant.

P. W. Cullinan, for the respondent.

PARKER, P. J.: Prior to the passage of the "Liquor Tax Law," in 1896, the disposition of all excise moneys arising from licenses granted in the town of Plattsburgh was regulated by section 3 of chapter 435 of the Laws of 1879, as amended by chapter 471 of the Laws of 1894. That act was entitled "An act in relation to the raising of funds for the relief of the poor of the town of Plattsburgh, in the county of Clinton." And by it all such

moneys were required to be deposited by the excise commissioners with the "treasurer of the poor fund," and to be expended under the direction of the board of alms for the support of the poor of such town.

By the provisions of "The Liquor Tax Law" (Chap. 112, Laws of 1896) such excise moneys are required to be paid to the county treasurer, and he is required to pay one-third thereof to the Treasurer of the State of New York, to the credit of its general fund for the benefit of the State, and the remaining two-thirds to the supervisor of the town. Such two-thirds are declared to "belong to the town," and the town is authorized to appropriate and expend them "in such manner as is now or may hereafter be provided by law for the appropriation and expenditure of sums received for excise licenses," etc. (§ 13.)

It is further provided by such law that "The provisions of any special or local law, grant or charter in conflict with this act are hereby repealed and annulled," and that "The repeal of any law by this act shall not revive a law repealed thereby." (§ 44.)

Thus, section 3 of the act of 1879, as amended by the act of 1894, was repealed or annulled in so far as it assumed to direct that *all* of the excise moneys collected in the town of Plattsburgh should be applied to the support of its poor. And also in so far as it specified the town officers to whose custody such moneys should be intrusted.

In all other respects it was unaffected by such Liquor Tax Law, and, therefore, remained operative as to two-thirds of the excise moneys which were by the latter act declared to "belong to the town."

Subsequently, by chapter 125 of the Laws of 1898, such section 3 was again amended so that it should read as follows:

"§ 3. All excise money arising from licenses granted in the town of Plattsburgh, shall be deposited with the treasurer of the poor fund of said town by the county treasurer of said county within ten days after the receipt by him of the same, to be used and expended under the direction of the board of alms of said town for the support of the poor of said town, and all fines and forfeitures recovered in said town for a violation therein of the 'liquor tax law' (except in the prosecution of indictment and except for a violation of chapter three hundred and twenty-two of the laws of eighteen hundred and ninety, and the acts amendatory thereof, amending the charter of the village of Platts-

burgh), shall be paid to said treasurer of the poor fund of said town for like purpose. Provided, that in case the said moneys so paid to said treasurer annually, shall exceed the amount estimated by the board of alms of said town, as hereinafter provided, which in their opinion will be required for the relief of the poor of said town during the next ensuing year from the first day of May of each year, such excess shall be appropriated and expended for the construction and repair of the highways and bridges of said town, and for other town purposes, as shall be authorized and directed by the town board of said town of Plattsburgh, and shall be paid by said treasurer as directed by said town board, upon order of said town board, signed by the supervisor and clerk of the same, and for the purpose of ascertaining the amount of such excess, said board of alms shall, on or before the tenth day of May in each year, make and file with the supervisor of said town of Plattsburgh, an estimate of the amount which, in their opinion, will be required for the relief of the poor of said town during the ensuing year, from the first day of May of each year."

Such act of 1898 also further provides that "All acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

By this amendment the application of the excise moneys collected in the town of Plattsburgh is apparently changed in two particulars:

First. All of such moneys are to be paid by the county treasurer to the treasurer of the poor fund of the town, thus diverting from the State the one-third which by the Liquor Tax Law was to be paid into the treasury of the State, and appropriating it all to the uses of the town.

Second. So much only shall be applied to the support of the poor as the board of alms shall determine necessary for the ensuing year by an estimate made on or before May tenth of each year. The balance shall be applied to the construction and repair of highways.

In this last particular, the provisions of section 3, as they were originally fixed by the act of 1894, applied all of such moneys to the support of the poor, and none could have been appropriated to the highways of the town.

The change allowing a portion of the excise moneys received by the town to be applied to the highways is not in conflict with any

provision of law. But the first provision of the act, requiring that *all* of such moneys shall be paid over to the treasurer of the poor fund for the use of the town, is squarely inconsistent with the provision of the Liquor Tax Law requiring one-third thereof to be paid to the State; and the question presented by this proceeding is, whether such construction is to be given to this statute as will permit of such a diversion of that one-third.

“The cardinal rule in the interpretation of statutes is to arrive at and give effect to the intention of the legislative body which enacted them. This intention is primarily to be deduced from the language used in the statute itself; and it has been said that where such language is clear and unambiguous there is no room for construction, and that effect must be given to its plain and obvious meaning.”

It sometimes happens, however, that language which, when separated from the rest of the act, is thus plain and unambiguous, when read in connection with the whole act, or with the evident purpose to be accomplished by the act, may thereby be rendered ambiguous, and the necessity for construction may thereby arise.

In such instances the legislative intent is to be gathered from the whole statute, its object, and the obvious purpose for which it was enacted. And also, in seeking for such intent, acts and parts of acts “*in pari materia*” may be considered. (*People ex rel. Savings Bank v. Butler*, 147 N. Y. 165, 167; *Smith v. People*, 47 id. 330.) But when the language used “is susceptible of but one meaning, it must receive that meaning, although such construction leads to results which are absurd or mischievous.” (23 Am. & Eng. Ency. of Law, 299; *Roscnplauter v. Roessle*, 54 N. Y. 262.)

Construing the act before us by the rule above quoted, and it is certainly as broad and favorable to the respondent as any I can find, I am unable to concur with the decision from which this appeal is taken. There is certainly no ambiguity in the language of the statute itself. It is a distinct and clear direction that “*All* excise money arising from licenses granted in the town of Plattsburgh” shall be appropriated to the use of such town. Nor is there any other language in this act which would suggest any doubt upon the intent of the Legislature to apply the whole of such excise moneys to that purpose. Neither does the plain purpose of the act itself suggest any such doubt. It is an act “in relation to the raising of funds for the relief of the poor” of that

town. Its intent manifestly is that the poor fund of the town shall be supplied from the excise moneys raised therein; and nowhere in the act is there a hint or suggestion that any part less than the whole of such moneys shall be so applied, save the provision which gives so much of them as is not needed for that purpose to the highways.

Thus, neither from the language of the act, when read all together, nor from the purpose and object for which it was enacted, do we find any reason to suppose that the Legislature intended to appropriate any less than the whole of the excise moneys raised therein to the use of the town.

It is contended, however, that, read in connection with the "Liquor Tax Law" above cited, it is apparent that the Legislature could not have intended to appropriate more than two-thirds of such excise moneys to the use of such town.

The basis of this argument is that such Liquor Tax Law furnishes a general scheme for the disposition of all the excise moneys raised in every town in the State, and that scheme devotes one-third of the amount raised in each town to the use of the State; that this act of 1898, which is one "*in pari materia*" with that act, so far as it relates to the disposition of excise moneys, must be read in connection with it, and that hence arises a doubt as to the intent of the Legislature which calls for judicial construction. But, reading the act of 1898 in connection with the other one, we still find that its language is plain and unmistakable. No phrase is used, which, apparently plain in itself, becomes ambiguous when considered with the other act. It is true that the use of the phrase "All excise money arising from licenses granted in the town of Plattsburgh" renders the act inconsistent with the requirement of the Liquor Tax Law, that one-third thereof be paid over to the State, but this inconsistency does not render the phrase itself ambiguous. If the Legislature had intended to change the Liquor Tax Law in this respect, and restore to the town of Plattsburgh the right to use the whole of its excise moneys, this act of 1898 would have been a complete and appropriate method of doing it. In effect, it re-enacts so much of the act of 1894 as was repealed by the Liquor Tax Law, and thus restores that town to the precise condition in which it was before such latter act took effect. And when we remember that this very act of 1898 expressly repeals all acts and parts

of acts inconsistent with its provisions, how shall we say that such restoration was not intended?

The doubt which the Liquor Tax Law suggests is not as to the meaning of the phrase above cited, but as to whether the Legislature intentionally and understandingly used it. In other words, the *only* doubt which it suggests is, whether the Legislature would have been likely to do such a thing as the plain language of the act of 1898 indicates that it has done.

Such a doubt is by no means an ambiguity that permits judicial construction. I concede that the reasons which inspired the Legislature to such an act are to me unaccountable. I can not conceive why the town of Plattsburgh should be allowed to retain to its own use all of the excise moneys raised therein, while every other town and city in the State is required to pay over one-third thereof to the treasury of the State. But yet, if in its inscrutable wisdom the Legislature has so enacted, it is not within the province of this court, under the form of judicial construction, to avoid or amend such legislation because it is unable to find therein either wisdom or justice. That the plain language of the act of 1898 does so enact, can not be doubted, and, except for the fact that we can not understand the reason of it, there is nothing to indicate that the Legislature did not intend it.

I am of the opinion that the order appealed from should be reversed.

All concurred, except KELLOGG, J., not sitting.

Order reversed, with ten dollars costs and disbursements, and order granted that a peremptory mandamus issue as asked for in moving papers.

Third Appellate Department, January, 1900. Reported. 47 App. Div. 111.

In the Matter of an Application to Revoke and Cancel a Liquor Tax Certificate No. 14,685, Granted to BERNARD E. McCUSKER, doing Business under the Firm Name of ARTHUR McCUSKER & Son, at Nos. 60 and 62 Division Street, Troy, N. Y.

BERNARD E. McCUSKER, Appellant; CHARLES H. McCUSKER, Respondent.

Liquor tax certificate—What is “a building occupied exclusively as a church”—The doctrine of *res adjudicata* not applicable, where a decision was made on stipulated facts.

A two-story building, the upper story of which is used exclusively for the religious services of a Jewish congregation, and the lower story of which is used for its Sunday school and also as a meeting place of three benevolent societies, the membership of which is limited to people of Jewish birth, but not necessarily to members of that particular congregation, each of which societies pays rent to the church which is used in its support, is “a building occupied exclusively as a church” within the meaning of subdivision 2 of section 24 of the Liquor Tax Law (Laws of 1896, chap. 112).

A proceeding for the revocation of a liquor tax certificate instituted by a citizen of the State under section 28 of the Liquor Tax Law upon a stipulated statement of facts, on the ground that the building in which the traffic was conducted was within 200 feet of the church, which results in the denial of the application, is not a bar to a proceeding instituted by another citizen upon the same ground for the revocation of a subsequent certificate covering the same premises, where no such stipulation is made.

Parker, P. J., dissented.

APPEAL by Bernard E. McCusker from an order of the Supreme Court, entered in the office of the clerk of the county of Rensselaer on the 25th day of September, 1899, revoking and canceling the liquor tax certificate granted by John Don, as county treasurer of Rensselaer county, to said Bernard E. McCusker.

James E. Cooley, for the appellant.

P. C. Dugan, for the respondent.

LONDON, J. The appellant's building in which he was authorized by the liquor tax certificate, revoked and canceled by the order appealed from, to traffic in liquors, and in which he carried on such traffic, is situate on the west side of Third street

in the city of Troy, and is separated by less than three feet from the "Berith Sholom Temple," a Jewish synagogue, situate on the same street, and the distance from the center of the nearest entrance of the one to the center of the nearest entrance to the other is less than 200 feet. At the date of the passage of the Liquor Tax Law, March 23, 1896, the building in which the appellant traffics in liquors was not lawfully occupied for a hotel, nor was it a place in which such traffic in liquors was lawfully carried on at that date, and in the latter particular the appellant's application for the certificate was not true. The certificate was granted to him in violation of subdivision 2 of section 24 of the Liquor Tax Law (Chap. 112, Laws of 1896), if the synagogue was "a building occupied exclusively as a church." The Special Term found that it was so used, and we are asked to review this finding of fact. The church building has been occupied as a church for thirty years. It consists of two floors or stories, the upper story being used exclusively for the religious services of the church, and the lower story for the Sunday school of the church, and also as the meeting place of three lodges, namely, the Free Sons of Israel, the Keshet Shel Barshel and the Independent Order of Benai Berith. These are benevolent societies of a fraternal character, having some features of insurance or pecuniary aid in case of need, with education and moral helps or incidents. The membership is exclusively limited to those who are Jews by birth, but not necessarily members of this church or congregation. They usually hold weekly meetings, each at a separate time from the other, and each pays the church some rent which is devoted to its support. When the church was built this lower story was fitted for the accommodation of such societies, and with the view of deriving some revenue from them. While not dependent upon the church, or subject to it, they are helpful to it, and their existence, methods and usefulness are in harmony with its faith and teachings, and they enjoy its favor. The tie which binds these collateral societies to the church itself seems to be partly a community of religious faith, and partly of mutual helpfulness in temporalities. The rule of construction adopted by the courts in such cases favors the churches, and not the traffickers in liquor. (*Matter of Place*, 27 App. Div. 561, and cases cited at page 568.) We think it would be a harsh and unwarranted construction which would deprive this church of the protection of the statute, simply because the

scheme of its usefulness is broad enough to embrace such societies composed of persons born within its faith, although all of them do not actually worship within its temple. It is, no doubt, open to them when they wish to do so.

A proceeding similar to this was instituted by one Holden to revoke and cancel the liquor tax certificate issued to the appellant in 1898, upon the ground that the building in which he trafficked in liquors was within 200 feet of the church. The application was denied. (*Matter of McCusker*, 23 Misc. Rep. 446.) The order in that case is no bar to this. The certificate is not the same; the applicant is not the same; the facts stipulated in that case took the appellant's place of business out of the prohibition of the statute; such a stipulation is not here made. Any citizen of the State may make the application. (Liquor Tax Law § 28.) If a proceeding by one petitioner upon a stipulated state of facts could bar every other petitioner from proceeding upon a proved state of facts, the temptation to an early and collusive proceeding would be great. We do not think the earlier proceeding was collusive, but the rule invoked, if sanctioned, would invite collusion.

The order is affirmed, with costs.

All concurred; except PARKER, P. J., dissenting.

Order affirmed, with ten dollars costs and disbursements.

Second Appellate Department, January, 1900. Reported. 47 App. Div. 320.

In the Matter of the Application of JOHN C. SEYMOUR and J. T. DAWSON for an Order Directing MILLIARD F. VAN EVERA to Deliver up for Cancellation a Liquor Tax Certificate held by him, and for an Order Directing CHARLES L. MEAD, County Treasurer of Orange County, to Cancel the Same.

CHARLES L. MEAD, County Treasurer of Orange County, Appellant; JOHN C. SEYMOUR and J. T. DAWSON, Respondents.

Liquor tax certificate—Proceedings to revoke it—County treasurer not bound to institute them—Costs against him not payable from excise moneys.

It seems, that an order revoking a liquor tax certificate, made in a proceeding instituted by two citizens of the State of New York, under sub-

division 2 of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), may, in a proper case, charge the costs of the proceeding upon the county treasurer who granted the certificate and who was a party to the proceeding.

The failure of the county treasurer to institute judicial proceedings for the revocation of the certificate upon being informed that the holder thereof had obtained it by fraud and without the necessary consents, does not afford a sufficient reason for charging the county treasurer with costs.

The court has no power in such proceeding to direct costs awarded against the county treasurer to be paid out of the excise moneys received by him.

APPEAL by Charles L. Mead, county treasurer of Orange county, (1) from an order of the Supreme Court, made at the Dutchess County Special Term and entered in the office of the clerk of the county of Orange on the 9th day of May, 1899; (2) from an order of the Supreme Court, made at the Dutchess County Special Term and entered in the office of the clerk of the county of Orange on the 9th day of May, 1899, and (3) from an order of the Supreme Court, made at the Dutchess County Special Term and entered in the office of the clerk of the county of Orange on the 29th day of May, 1899, and, particularly, from each and every part of said orders relating to the payment of costs and disbursements by the said Charles L. Mead, as such county treasurer of Orange county.

William E. Schenck, for the appellant.

Caleb Birch, Jr., for the respondents, petitioners.

WILLARD BARTLETT, J. This proceeding was instituted under subdivision 2 of section 28 of the Liquor Tax Law by two non-official citizens to procure the revocation and cancellation of a liquor tax certificate issued to Milliard F. Van Evera by Charles L. Mead, as county treasurer of Orange county. It resulted in an order revoking the certificate and directing that it be delivered up to be canceled on the ground that material statements in the application of the holder were false and that he did not have the necessary consents required by the statute. The order of revocation charged the county treasurer with the costs and disbursements of the proceeding, to be paid out of any liquor tax funds in his hands or which may hereafter come into his hands. There is no appeal by the liquor dealer whose certificate

has been revoked, and the only respect in which the propriety of the order is questioned upon the appeal of the county treasurer is in regard to the provision awarding costs against that officer.

The county treasurer was necessarily made a party to the proceeding. "Upon the presentation of the petition," says the statute, "the justice or court shall grant an order requiring the holder of such certificate and the officer who granted the same, or his successors in office, to appear before him, or before a special term of the supreme court of the judicial district, on a day specified therein, not more than ten days after the granting thereof." (Laws of 1896, chap. 112, § 28, subd. 2, as amd. by Laws 1897, chap. 312.) The appellant, being the officer who granted the certificate, had to be brought into the proceeding by the petitioners. Being thus made a party, the judge or court was authorized, in the exercise of a judicial discretion, to charge him with costs by virtue of the final clause of the subdivision cited, which provides: "Costs upon such proceedings may be awarded in favor of and against any party thereto, in such sums as in the discretion of the justice or court before which the petition is heard, may seem proper."

That portion of the order of revocation which charges the appellant with costs payable out of excise moneys is preceded by a recital that it has been made to appear to Mr. Justice BARNARD that, some time prior to the institution of the present proceeding, the county treasurer had been notified that Milliard F. Van Evera was trafficking in liquor without the necessary consents, and that his application was fraudulent, and that the county treasurer had not taken any proceedings to cancel the certificate. In behalf of the appellant it is argued that the facts thus recited do not constitute a valid reason for awarding costs against him, inasmuch as under the law the county treasurer, as such, is not required to proceed against the holders of liquor tax certificates for the revocation and cancellation of the same on the ground that material statements in the application therefor were false. Such proceedings are authorized by subdivision 2 of section 28 of the Liquor Tax Law, to be instituted by "any citizen of the State." No authority to prosecute them is conferred by that subdivision upon any particular officer as such. By section 29 of the act, the county treasurer is empowered to maintain injunction proceedings against persons who shall unlawfully traffic

in liquor without obtaining a liquor tax certificate, or shall traffic in liquors contrary to any provision of the statute; but the present proceeding was not of that nature. It was begun and conducted under subdivision 2 of section 28, and we think it quite clear that the appellant is right in his contention that a county treasurer is not chargeable under that subdivision with the duty of endeavoring to procure a judicial revocation of a certificate obtained without the necessary consents. The language of the subdivision makes this very plain, because the order to show cause is to run not only against the holder of the certificate, but the officer who granted the same. This is ordinarily the county treasurer, except in counties containing a city of the first class. It could hardly have been in the contemplation of the lawmakers that the county treasurer should be a petitioner and a respondent in the same judicial proceeding.

The propriety of the award of costs in the present case is made to depend solely upon the single reason recited in the order of revocation, and we do not see how it can be sustained.

The authority to direct the costs to be paid out of the excise moneys is also questioned. It is argued that inasmuch as the Liquor Tax Law directs the distribution of all excise moneys within ten days after they are received, there is no judicial power to provide for the disposition of any portion of such moneys by way of costs, as is attempted in the order of revocation here. In section 29 of the Liquor Tax Law, relating to injunction proceedings for unlawfully trafficking in liquors, there is an express provision to the effect that if costs are awarded against the People of the State of New York they shall be payable by the county treasurer, upon the certificate of the justice or court, out of any excise moneys which may be in his hands, or which may thereafter come into his hands. There can be no doubt about the authority of the officer to apply excise moneys in payment of costs under this provision. Indeed, the certificate directing the payment of the costs out of such moneys in the present proceeding expressly purports to be made under section 29 of the Liquor Tax Law. As already pointed out, however, the present proceeding was conducted, not under section 29, but under section 28, which does not authorize the award of costs out of excise moneys. The express grant of power to compel the payment out of the excise moneys in a proceeding under one of these sections, and the omission of any like provision in the section immediately

preceding it, is clearly significant of the legislative intention to authorize resort to the fund in one class of cases, but not in the other.

For these reasons the orders, so far as appealed from, must be reversed.

All concurred.

Orders appealed from, so far as they charge the appellant Mead with costs and disbursements, reversed, with ten dollars costs and disbursements of this appeal.

Fourth Appellate Department, January, 1900. Reported. 47 App. Div. 634.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. LUMAN W. GREEN, Appellant, v. FOREST HOLLEY AND OTHERS, as Inspectors of Election, Respondents.

Ottoway & Munson, for appellant.

The inspectors of election of the town of Westfield, Chautauqua county, erroneously reported that the local option questions under section sixteen of the Liquor Tax Law, to regulate the traffic in liquors "in said town," had been submitted, stating the result of such submission, whereas through a mistake of the clerk providing the local option ballots, another town was specified in such local option questions.

Under the Election Law, inspectors of election are wholly ministerial officers. (*People ex rel. Stapleton v. Bell*, 119 N. Y. 185; *Matter of Stuart*, 24 App. Div. 212.)

Where false return is made, through error or otherwise, the court must compel a true return; the writ of peremptory mandamus is the proper remedy. (*Matter of Stuart*, 155 N. Y. 548, 24 App. Div. 201-206; *Gleason v. Blanc*, 14 Misc. 620; *People ex rel. Smith v. Scheillein*, 95 N. Y. 124; *People ex rel. Smithers v. Richmond*, 25 N. Y. Supp. 144; *People ex rel. White v. Aldermen*, 31 App. Div. 446; *People ex rel. Monroe v. Board of Canvassers*.

129 N. Y. 469; *People ex rel. Nichols v. Board of Canvassers*, 129 N. Y. 401; *People ex rel. Ranton v. Syracuse*, 88 Hun, 203.)

This remedy has been prescribed by this court. (*People ex rel. Leonard v. Hamilton*, 42 App. Div. 215.)

Kingsbury & Kingsbury, for respondents.

There being no proof that any voter was misled by the clerical error in the ballot, but rather undisputed proof to the contrary, the writ was properly denied. (*People ex rel. Hirsh v. Wood*, 148 N. Y. 148; *People ex rel. Leonard v. Hamilton*, 42 App. Div. 212.)

Order reversed, with ten dollars costs and disbursements, and writ of peremptory mandamus, as prayed for, granted.

All concurred.

Fourth Appellate Department, January, 1900. Reported. 47 App. Div. 634.

In the Matter of the Application of JOSIAH V. LOCKLIN AND OTHERS, Appellants, for an Order Restraining MICHAEL J. LEE, Respondent, from Unlawfully Trafficking in Liquors.

Order of the Special Term modified by striking therefrom the provision as to costs, and as thus modified affirmed, without costs of this appeal to either party.

All concurred.

Fourth Appellate Department, January, 1900. Reported. 47 App. Div. 634.

In the Matter of the Application of JOSIAH V. LOCKLIN AND OTHERS, Appellants, for an Order Restraining FRED D. WOOLLETT, Respondent from Unlawfully Trafficking in Liquors.

Order of the Special Term modified by striking therefrom the provision as to costs, and as thus modified affirmed, without costs of this appeal to either party.

All concurred.

Court of Appeals. Reported. 161 N. Y. 641.

In the Matter of the Petition of HENRY H. LYMAN, Respondent,
for an Order Revoking and Canceling Liquor Tax Certificate
No. 31,344, Issued to PATRICK RYAN, Appellant.

Matter of Lyman, — App. Div. —, appeal withdrawn.
(Submitted January 15, 1900; decided January 18, 1900.)

MOTION to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 15, 1899, which affirmed *pro forma* an order made by a justice of the Supreme Court at Chambers, appointing a referee to take testimony herein and report the same to the said justice.

The motion was made upon the ground that the order originally appealed from is not appealable, no certificate allowing such appeal having been granted by the Appellate Division.

The appellant, in opposition to the motion, requested leave to withdraw his appeal, without costs, upon the grounds that the counsel for the respondent had refused to consent to the granting of a certificate allowing the appeal, and that the Appellate Division had revoked its order of affirmance.

William E. Schenck for motion.

John P. Curley opposed.

Application of appellant to withdraw appeal, without costs, granted.

Court of Appeals. Reported. 161 N. Y. 645.

In the Matter of the Separate Applications of JOHN C. MCGREIVEY et al., Respondents, for a Writ of Certiorari to Review the Action of BARTLETT B. GRIPPEN, as County Treasurer of Saratoga County, Appellant, in Refusing to Issue a Liquor Tax Certificate.

Matter of McGreivey, 37 App. Div. 66, affirmed.
(Argued January 8, 1900; decided January 23, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 12, 1899, which affirmed an order of the Special Term directing the county treasurer of Saratoga county to issue liquor tax certificates to the relators herein.

P. W. Cullinan for appellant.

Thomas O'Connor for respondents.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

Court of Appeals. Reported. 161 N. Y. 645.

In the Matter of the Separate Applications of WILLIAM F. MATTHEWS et al., Respondents, for a Writ of Certiorari to Review the Action of GEORGE L. CLEMONS, as County Treasurer of Washington County, Appellant, in Refusing to Issue a Liquor Tax Certificate.

Matter of Matthews, 37 App. Div. 626, affirmed.
(Argued January 8, 1900; decided January 23, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered July 12, 1899, which affirmed an order of the Special Term directing the county treasurer of Washington county to issue liquor tax certificates to the relators herein.

P. W. Cullinan for appellant.

Thomas O'Connor for respondents.

Order affirmed, with costs, on opinion below.

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ.

Supreme Court, Cayuga Special Term, February, 1900. Unreported.

PEOPLE ex rel. JAMES S. CALDWELL v. GEORGE S. WOOD, on the
Return of a Writ of Habeas Corpus.

Mr. A. J. Parker, for relator.

Mr. R. L. Drummond, for respondent.

DWIGHT, J. The relator was convicted, in the County Court of Cayuga county on the 12th day of February, 1900, of a misdemeanor under subdivision 1 of section 34 of the Liquor Tax Law of 1896, as amended in 1897, and was sentenced thereupon, to imprisonment in the county jail for the term of three months, and he is now held by the sheriff by virtue of a commitment issued out of said court in pursuance of such sentence. He now objects that the sentence was without authority of law and void, because not within the authority and requirements of the statute under which he was convicted.

The subdivision of the statute cited above, defines the offense of trafficking in liquors without having paid the tax and obtained the certificate provided for by the Act, and it declares that the person so unlawfully trafficking "shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than \$200 nor more than \$1,000, provided that such fine shall equal at least the amount of the tax for one year imposed by this act upon the kind of traffic in liquors carried on, where carried on, or which would be so imposed if the traffic were lawful, and may also be imprisoned in a county jail or penitentiary for the term of not more than one year." The objection of the relator is to the effect that the court had no authority to impose a term of imprisonment until it had first imposed a fine.

The objection at once calls attention to the peculiar and altogether exceptional language employed in prescribing the punishment of this particular offense. It is no longer, as in all other similar provisions, of which I am aware, of the statutes relating to misdemeanors, that the offense shall be punished by a fine of not more than so many dollars or by imprisonment for a term of not more than so many months, or by both such fine or

imprisonment; on the contrary the requirement here is absolute that the offense *shall be* punished by a fine, and *may also* be punished by imprisonment. The inquiry is at once suggested why this variation from all other statutes prescribing the punishment of misdemeanors? and the answer, I think, is found in the peculiar character and purpose of the statute, as a whole, and in the definition of the particular offense in question.

In the first place it is apparent from the general scope and tenor, and even from the title of the Act, as well as from many of its particular provisions, that it was primarily intended as a statute for revenue and only incidentally for the regulation or restriction of the traffic in intoxicating liquors.

With this general purpose of the statute the positive prescription of a fine and the permission, merely, to add a term of imprisonment, found in the provision under consideration, is consistent; but even more significant is the particular definition of the fine to be imposed. It shall not be less than \$200, nor more than \$1,000, but in every case it shall equal at least, the amount of the tax which the offender would have been required to pay in order to legalize the traffic which he has unlawfully carried on. First of all, then, he shall pay at least as much by way of fine as his neighbors, lawfully engaged in the same kind of traffic, have been required to pay by way of tax, and as much more as the particular circumstances of his offense seem to justify.

Such unquestionably is the absolute requirement of the statute in respect to the imposition of a fine and then follows—in the order observed in the enactment—a discretion conferred upon the court whether “also” to impose the punishment of a term of imprisonment in the county jail or penitentiary. Is it not the intention of the statute that the exercise of that discretion shall follow the imposition of the fine or at least the determination of its amount? If the fine exceed the amount of the tax, which shall, at least be covered by it, such excess is wholly punitive, and it may be assumed that the discretion whether to impose still further punishment will be largely controlled by the amount of the fine already imposed, or to be imposed. Was it not the intention of the statute that it should be so controlled? .

Led by these considerations I have reached the conclusion that the reasonable interpretation of the provision in question excludes any authority in the court to impose a term of imprison-

ment as punishment for the offense defined by the subdivision quoted, except as additional to a fine already imposed or to be imposed.

The question, so far as appears, is entirely new and must be determined on principle. If my solution of it is correct then the sentence imposed in this case was without authority of law and void, and the relator can no longer be held under it.

An order may be entered discharging the relator from further imprisonment under the commitment set out in the return of the sheriff.

County Court, Westchester County, February, 1900. Unreported.

PEOPLE ex rel. CHARLES SCHULER v. ADAM E. SCHATZ.

LENT, Co. J. It may be that the defendant was entitled to have the people elect to try upon only one charge, that of giving away, or that of selling — either is a violation of the statute, and I do not see that the defendant is prejudiced by the form of the information.

Application for discharge denied.

Supreme Court, New York Special Term, February, 1900. Reported.
30 Misc. 515.

Matter of the Application of ADOLPH HALBRAN, for an Order
Revoking and Cancelling Liquor Tax Certificate Issued to
ODILLE C. CANAVAN.

Liquor Tax Law—Revocation of license invalid originally—Reference.

Any citizen, although not a taxpayer, is authorized (Laws of 1896, chap. 112, § 28, subd. 2) to petition for the revocation of a liquor tax certificate where he claims that the holder was not originally entitled to it, and the fact that the holder has never been convicted of a violation of the statute is not material and affords him no defense.

Where the answer of the holder puts in issue a material allegation of the petition, a reference should be directed in order to determine the issue.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

Lyman B. Bunnell, for petitioner.

BEEKMAN, J. The petitioner in this proceeding asks for an order revoking and canceling a liquor tax certificate on two grounds: (1) Because the applicant therefor gave a false answer to "question 16" in the statement filed at the time the certificate was applied for, and (2) Because the consents of two-thirds of the owners of the private residences within 200 feet of the premises where the proposed traffic in liquors was to be carried on had not been obtained and filed as required by law. With respect to the first ground, the application must be denied. The petition does not state what "question 16" was, nor does it give the answer claimed to have been false. As neither the original statement nor a copy of the same forms any part of the moving papers, the petition is plainly defective, as it fails to comply with the statute which requires the petitioner to state the facts on which his allegations are based, Laws of 1896, chap. 112, § 28, subd. 2. This criticism, however, does not apply to the other ground above referred to, and, as the answer of the respondent puts it in issue, there must be a reference to take proof upon the question. As the respondent contends that this proceeding has been instituted without the authority of the petitioner, evidence may be taken, before the referee upon this point also. The reference should proceed as far as possible from day to day. Counsel for the respondent has urged that, under Matter of Lyman, 160 N. Y. 96, the petition should be dismissed, on the ground that such a proceeding as this cannot be entertained until after a conviction of the respondent has been had in a criminal prosecution for the violation of the law which is complained of. In this he is quite mistaken. Whatever was there decided by the Court of Appeals in this connection was carefully limited to cases where the motion for a revocation of the certificate is based upon a violation of the law occurring subsequent to the issuing of the certificate and subjecting it to forfeiture. Such a case as this, which rests upon the general ground that the respondent was not entitled to receive or hold the certificate when it was delivered, is plainly not within the decision, as the opinion of the court clearly shows. Still another objection

was made to this proceeding on the ground that the petitioner, although averring that he is a citizen of the State of New York, has failed to show that he is a taxpayer. A reference, however, to section 28, subdivision 2, of the Liquor Tax Law, under which this proceeding was instituted, shows that no other qualification is required than that the moving party should be a citizen of the State. It is only in the case of a proceeding instituted under section 29 of the law that a private party making the application there authorized must be a taxpayer. The two proceedings are different in character and purpose, and the statutory provisions with respect to one do not apply to or govern the other. The counsel for the respondent cites in support of his claim the case of *People ex rel. Smaw v. McGowan*, as reported in 60 N. Y. Supp. 407. But there the proceeding was one brought under section 29 of the statute and not under subdivision 2 of section 28, as is the case here. It is true that in the opening words of the opinion as above reported, the latter statute is referred to as the one under which the proceeding there was commenced, but a reference to the official report of this case (44 App. Div. 30) shows that the words "Section 29 of the Liquor Tax Law" are used in place of the words "Subdivision 2, section 28, Liquor Tax Law." Of course the official report must control. The point thus raised is, therefore, not well taken.

Ordered accordingly. _____

Supreme Court, New York Special Term, February, 1900. Reported.
30 Misc. 517.

Matter of the Application of ADOLPH HALBRAN, for an Order
Revoking and Cancelling Liquor Tax Certificate Issued to
MICHAEL MERKEL, and Transferred to THOMAS J. DONNELLO.

Liquor Tax Law—Death of petitioner for revocation of license originally invalid.

The death of a citizen, who has petitioned for the revocation of a liquor tax certificate upon the ground that the holder was not originally entitled to it, does not, where the original application has not been revived, preclude another citizen from making a new application in the matter.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

Lyman B. Bunnell, for petitioner.

BEEKMAN, J.: This is a proceeding instituted under subdivision 2 of section 28 of the Liquor Tax Law for the cancellation of a liquor tax certificate on the ground that the property for which the certificate was issued was within 200 feet of a church edifice; that it was also within 200 feet of private houses occupied exclusively as private residences, and that the consents of two-thirds of the owners of the same had not been obtained; that the consent of the owner of the premises on which the traffic was to be conducted had not been duly secured, and that the answers to certain questions contained in the statement filed with the sub-commissioner of excise in this county when the application for the certificate was made were false. These allegations are all put in issue by the answer which has been filed by the respondent. The usual course in such cases must, therefore, be followed, and the matter sent to a referee to take proof. The proceeding which had previously been instituted against the respondent by one Clark with respect to the same matters abated by his death, and not having been revived, it in no way constitutes an objection to the maintenance of this proceeding, which has been brought by another person. The claim, that the petition should be dismissed under the authority of *Matter of Lyman*, 160 N. Y. 96, is untenable, as is also the contention that the petition is defective because of its failure to show that the petitioner is a taxpayer, for the reasons which I have stated in my memorandum in the case of *Matter of Canavan*, 30 Misc. 515.

Ordered accordingly.

Supreme Court, St. Lawrence Special Term, February, 1900. Reported.
30 Misc. 543.

CASPER SCALZO, Plaintiff, v. MARTIN R. SACKETT, as Treasurer
of the County of St. Lawrence, Defendant.

Liquor Tax Law—Deposit, for certificate, not recoverable by one who failed to comply with the law.

Where one, who traffics in liquors and who thereafter continued so to traffic, makes a preliminary deposit with the county treasurer but is never given a liquor tax certificate because his application therefor was defec-

tive and because he never gave a bond, he can not recover his deposit, as his failure to obtain a certificate was caused by his neglect to comply with the statutory requirements.

ACTION by plaintiff to recover money deposited with the county treasurer of St. Lawrence county for a liquor tax certificate.

Watson B. Berry, for plaintiff.

William E. Schenck, for defendant.

RUSSELL, J. The plaintiff seeks to recover \$58.34, money deposited with the county treasurer of St. Lawrence county for a liquor tax certificate to run from the 1st of October, 1898, to the 1st day of May, 1899, to be used for trafficking in liquors to be drunk on the premises in the town of Potsdam in such county. The money was deposited on the 15th day of December, 1898, and the plaintiff trafficked in liquors at various times from the 1st of October, 1898, to the 1st of May, 1899. No liquor tax certificate was given by the county treasurer because no bond was filed and the application was found to be defective. The plaintiff claims that he paid for protection in conducting the business that he transacted and received none. The defendant insists that the plaintiff assumed to use the privilege of dealing in liquors, and, if he did not receive full protection, such failure was owing to his own negligence, and that he could not recover back the money he deposited because he did not receive the certificate, on account of his own default.

Passing by the preliminary difficulty that this action is in form brought against the defendant in his official capacity, that he has ceased to be county treasurer, and had properly passed over to the State and the town of Potsdam the moneys received from the plaintiff, the inquiry remains as to the right to recover from anyone. Much thought has been given by counsel in the briefs presented to the consideration of the question whether the sum paid by those receiving liquor tax certificates is a tax or license immunity. It is, however, quite evident that, not being a tax in the sense of an assessment upon citizens for the support of the government which protects their persons and property, it is yet imposed upon a class as a contribution from them to aid the government for those expenditures which the business they are

privileged to conduct may entail upon the public generally, as a portion of the causes which lead to pauperism and crime. It is, therefore, in substance, a tax upon a special character of business, the payment of which privileges the conduct of the business, and the liquor tax certificate is simply the evidence of that privilege, although it may be transferable and valuable as property, the same as a promissory note which evidences the debt forming the consideration. When this tax is paid as the consideration of conducting the business itself it may not be recovered back without such meritorious ground for relief as shall cover no wrong or default of the person paying. If he had received the certificate and thereafter violated the terms upon which it was issued, by infractions of law, so that the certificate was thereafter cancelled, he could certainly not recover back the money paid, for there is an implied contract to obey the law upon which this certificate was issued to him. When he pays there is also an implied condition that he will otherwise comply with the law in furnishing the security required and the proper application. He cannot refuse to go on and fulfill the requirements exacted of him, while at the same time assuming to conduct the business and enjoying its emoluments, and then allege his own default as a meritorious reason for recovering back the money which he paid to the State and town. Nor will his exposure to civil or criminal penalties, occasioned solely by his own conduct, fortify his claim for recovery of the sum paid.

This view seems to have prevailed in the Supreme Court of Michigan in a case where the plaintiff sued to recover \$300 and interest for a liquor tax where the bond required by law to be given was not approved by the township board, and where the plaintiff continued the business of selling liquors until convicted of a violation of law. *Curry v. Township of Tawas*, 81 Mich. 355.

Judgment for defendant, with costs.

First Appellate Department, February, 1900. Reported. 48 App. Div. 275.

In the Matter of the Petition of HENRY H. LYMAN, Respondent,
for an Order Revoking and Canceling Liquor Tax Certificate
No. 6,111, Issued to PATRICK J. MONAHAN, Appellant.

Liquor tax certificate—Revocation of—A school building used occasionally by charitable societies retains its character as a school—Dismissal of the proceeding not proper because of the expiration of the tax certificate—Costs.

The fact that charitable, religious or temperance societies occasionally meet in a small room in a school building, used as a school library, paying a nominal rent to defray the cost of lighting and heating the room, does not deprive the building of its character as a building used exclusively as a schoolhouse.

The expiration of a liquor tax certificate authorizing the holder thereof to traffic in liquors in a place within 200 feet of the building in question, while an application for the revocation of the certificate is pending and undetermined, does not require the dismissal of the proceeding, as the determination of the character of the building is a matter of such interest to the certificate holder and to the public generally as to render a decision proper, and since under the statute costs may be awarded to the successful party—thus entitling the petitioner to have the proceeding determined as of the day when the petition was filed.

APPEAL by Patrick J. Monahan from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 8th day of July, 1899, revoking and canceling a liquor tax certificate there tofore issued to him.

Moses Weinman, for the appellant.

Herbert H. Kellogg, for the respondent.

McLAUGHLIN, J.: On the 13th of May, 1898, a liquor tax certificate was issued to Patrick J. Monahan, authorizing him to traffic in liquors at No. 1588 First avenue in the city of New York.

In November following application was made by the State Commissioner of Excise to revoke and cancel the certificate upon the ground (1) that the answers made by Monahan to two questions in his application for the certificate were false and material statements, and (2) that he had forfeited his right to the

certificate by selling liquors, after the same was issued to him, contrary to law.

The questions to which it was alleged he made false answers were, (1) "May the applicant lawfully carry on such traffic in liquors on such premises?" (2) "Does the applicant intend to traffic in liquors under the certificate applied for in any building, yard, booth, or other place, which is on the same street or avenue and within 200 feet of a building occupied exclusively as a church or schoolhouse?" The first question was answered in the affirmative and the second one in the negative.

In the petition by which the proceeding was instituted it was alleged that in answer to the two questions the defendant made material false statements in saying that his premises were not located within 200 feet of a building occupied exclusively as a church or schoolhouse, and that he could lawfully carry on the traffic of liquor on such premises.

In the answer interposed to the petition, the defendant denied that his premises were located within 200 feet of St. Monica's school (the building referred to in the petition), or on the same street with it, or that that building was occupied exclusively as a schoolhouse. He also denied that he had forfeited his certificate by violating the law.

The issues raised by the petition and answer were sent to a referee to take the proof and report the same to the court. Upon the coming in of the report, the court, at Special Term, held that Monahan's premises were located within 200 feet of a building used exclusively as a schoolhouse, and also that Monahan had forfeited his right to the certificate by violating the Liquor Tax Law (Laws of 1896, chap. 112), in selling liquors on Sunday. An order was made revoking and canceling the certificate, from which Monahan has appealed.

After a careful consideration of the testimony taken by the referee, we are entirely satisfied with the conclusion reached by the court at Special Term, that St. Monica's school is a building used exclusively as a schoolhouse, within the meaning of the statute, and that Monahan's premises are on the same street and less than 200 feet from it.

It was conceded, at least it was not seriously contested, that the appellant's saloon was located upon the same street and was less than 200 feet from St. Monica's school. It was urged, how-

ever, in the court below, as it was on this appeal, that St. Monica's school building was not used exclusively as a schoolhouse.

The testimony taken by the referee showed that there was one small room in the school building which was used as a library, in connection with the school, and in which charitable, religious or temperance societies occasionally met in the evening, and for which they paid a nominal rent to defray the cost of lighting and heating the room.

The fact that these societies occasionally met in this room did not deprive the building itself of its general character. It was a school building, built for and devoted to that use, and used exclusively for that purpose within the meaning and intent of the statute. The manifest purpose of the statute in this respect is to prevent the traffic in liquors within a specified distance of a school building, in order that the attendants of the school may not be subjected to the evil influences incident to or connected with the traffic in intoxicating liquors. This is the purpose of the statute and the object sought to be accomplished by it, and, as such, it should receive a liberal construction. Unless the court can see that some portion of the building is devoted to an object foreign to education, it will not nullify the statute by depriving the building of the benefit sought to be conferred upon it. In *People ex rel. Cairns v. Murray* (148 N. Y. 171) the court held that a building erected and used for a school does not fail to come within the designation of a building occupied exclusively as a schoolhouse, merely because the teachers, or some of them, reside in it.

In this school was the school library. Its use for that purpose was a part of the general work of the school, just as much as if it had been devoted to or used for a recitation room, and the fact that the meetings referred to were occasionally held in it did not, and could not, as I have already said, change the general character of the building itself. When, therefore, the appellant stated in his application that he did not intend to traffic in liquors under the certificate applied for in any building which was on the same street or avenue, and within 200 feet of a building occupied exclusively as a church or schoolhouse, he stated what was not true. It was a material statement, and the court had no other alternative than to revoke and cancel the certificate. This conclusion renders it unnecessary to consider or pass upon

the question of whether or not he had forfeited his right to the certificate by selling liquors on Sunday.

It is, however, urged by the appellant that the time for which the certificate was issued having expired before the order revoking and canceling it was made, the proceedings, for that reason, should have been dismissed. We do not think so. The order was made under subdivision 2 of section 28 of the Liquor Tax Law (Chap. 112, Laws of 1896, as amd. by Laws of 1897, chap. 312.) It settled and determined the character of St. Monica's school building, and that the appellant had no right to traffic in liquors on the premises at the place for which he had applied for and obtained a liquor tax certificate. This of itself constituted such interest, not only as to the defendant, but to the public generally, as to require a decision. (*Matter of Goodman*, 146 N. Y. 286.) Under the statute, costs may be awarded in favor of the successful party, and for that reason the petitioner had the right to have the proceeding determined as of the day when the petition was filed, and the order, when it was made, related back to and took effect as of that day.

The order is right and must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, PATTERSON and O'BRIEN, JJ., concurred.

Order affirmed, with costs.

Fourth Appellate Department, February, 1900. Reported. 48 App. Div. 633.

HENRY H. LYMAN as Commissioner of Excise of the State of New York, Respondent, *v.* JOHN M. KURTZ, Defendant, and the CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, Appellant.

Order affirmed, with costs.

All concurred.

ADAMS, P. J., not sitting.

Second Appellate Department, March, 1900. Reported. 49 App. Div. 630.

HENRY H. LYMAN *v.* EDWARD PERLMUTTER and FIDELITY AND
DEPOSIT COMPANY OF MARYLAND.

APPEAL from a judgment entered upon the report of a referee.

PER CURIAM. We have been addressed by an argument which asks us to overrule the decisions of the Supreme Court in the first and fourth Departments. (*Lyman v. Rochester Title Ins. Co.*, 37 App. Div. 234; *Lyman v. Brucker*, 26 Misc. 594; affirmed on appeal, 42 App. Div. 624; *Lyman v. Shenandoah Social Club*, 39 App. Div. 459.) The argument of the learned counsel for the appellant in support of his contention is forcible and able, but all of the views therein taken seem to have been met and answered by the decisions already rendered; and if we were doubtful of the correctness of such answer, its overthrow, if it be overthrown, must properly come from the court of last resort.

The evidence in the case is conflicting, and that adopted by the referee is not only contradicted, but in many respects contradictory. Nevertheless, there was clearly sufficient for him to render the judgment appealed from, and this court is powerless to interfere. (*Baird v. Mayor of New York*, 96 N. Y. 567.)

The judgment should therefore be affirmed.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
March 8, 1900.

In the Matter of the Application of JAMES HARPER for an Order
Restraining JULIUS KELLER from Unlawfully Trafficking in
Liquor.

FITZGERALD, J.: Motion granted enjoining respondent from trafficking in liquors. (See memorandum published May 5 in N. Y. L. Journal — see also memorandum published October 31, 1899, in N. Y. L. Journal.)

Supreme Court, New York Special Term. Reported. N. Y. L. J.,

In the Matter of the Petition of ROBERT HERSE to Revoke a Liquor
Tax Certificate of PATRICK J. SAVAGE.

LAMBERT, J. A reference having been ordered in this proceeding on the 10th day of July, 1899, at a Special Term of the Supreme Court held at the city and county hall in the city of Buffalo on that day, to Honorable William G. Laidlaw, a counselor of this court, residing at Ellicottville, N. Y., to take proof of the facts and circumstances set forth in the petition, and of the facts and circumstances alleged in opposition thereto, and report the said evidence together with his opinion thereon to this court; and said referee having duly taken said evidence and reported the same together with his opinion thereon;

And after hearing Fred L. Eaton for the relief asked for by the petitioner, to wit: the cancellation of liquor tax certificate No. 18,848, hereinbefore granted by the Treasurer of Cattaraugus county to Patrick J. Savage, and having heard Henry Donnelly in opposition thereto:

I find the following facts:

First. That heretofore and on the 1st day of May, 1899, William Ely as Treasurer of the County of Cattaraugus, issued to Patrick J. Savage liquor tax certificate No. 18,848, granting to said Patrick J. Savage the privilege of trafficking in liquors at No. 314 West State street, Olean, N. Y.

Second. That said certificate was issued by said county treasurer upon the face of an application therefor made by said Patrick J. Savage, filed with the said county treasurer, accompanied by what purported to be the written consents of the owners of two-thirds of the buildings occupied exclusively as dwellings, the nearest entrances to which were within two hundred feet on a straight line, of the nearest entrance to said premises No. 314 West State street, Olean, N. Y.

Third. That at the time of the issuance of said liquor tax certificate 18,848 to said Patrick J. Savage, the nearest entrances to the following buildings occupied exclusively as dwellings were within two hundred feet measured in a straight line, of the nearest public entrance to the building No. 314 West State street, Olean, N. Y., in which said Patrick J. Savage was to traffic in

liquors under said certificate. A double dwelling house consisting of two distinct dwellings without any internal communication one with the other, under one roof, located on Third street; a dwelling house owned by one William Stephan and occupied by a Jew named Sherris, on the north side of State street; a dwelling owned by one Van Campen on the south side of State street, corner of Second; a dwelling owned by one Ida J. Dickinson on Second street, north of State.

Fourth. That all of the entrances, rear, side and front, of the double dwelling above specified, the Van Campen house and the house occupied by the Jew, Sherris, were within two hundred feet, measured in a straight line, from the front entrance to the premises in which the traffic in liquors was to be carried on under said certificate.

Fifth. That the rear and side entrances of the dwelling hereinbefore specified as being owned by one Dickinson, were within two hundred feet, measured in a straight line, from the front entrance of the building in which traffic in liquors was to be carried on under said certificate.

Sixth. That the rear and side entrances of a building occupied exclusively as a dwelling, located on Third street, and owned by one Judge, were within two hundred feet, measured on a straight line, from the side entrance nearest State street of the building No. 314 West State street, in which traffic in liquors was to be carried on under said certificate.

That the rear and side entrances of the building occupied exclusively as a dwelling owned by the said Dickinson, and fronting on Second street, were within two hundred feet, measured in a straight line, of the side entrance nearest State street, of the building in which it was proposed to traffic in liquors under said certificate.

Seventh. That the rear and side entrances of a building occupied exclusively as a dwelling, owned by one Johnson and facing on Third street, are within two hundred feet, measured in a straight line, of the side entrance farthest from State street, of the building in which traffic in liquors was to be carried on under said certificate. And all of the entrances of the Dickinson house, second above specified, were within two hundred feet, measured in a straight line, of the said side entrance.

Eighth. That at the time of said application, another building was located on State street, all the entrances to which were

within two hundred feet, measured in a straight line, of the front entrance to building No. 314 West State street, in which traffic in liquors was to be carried on; and at said time such building was occupied by two sisters who did dressmaking therein, employing no help and selling no material, doing the dressmaking in the dining-room of the dwelling when not used for other purposes. In the front window of this dwelling, on the inside and upon the top rail of the lower sash, was a pasteboard card with the words "Dress Making" printed thereon, which card was visible from State street to those passing; which said building was owned by one Grossman.

Ninth. That at the time of filing his application for said certificate, the written consents filed therewith were as follows:

1st. The building owned by William Stephan, occupied by the Jew, Sherris. 2d. A. M. Chamberlain as agent for the owner of the house on Third street, designated as the Judge house. 3rd. George Van Campen as agent for the owner of the house hereinbefore designated as the Van Campen house on the south side of State street, corner of Second.

And that such consents were the only consents filed in connection with said application.

Tenth. That upon procuring said liquor tax certificate No. 18,848, said Patrick J. Savage commenced to and has ever since trafficked in liquors at said building No. 314 West State street, Olean, N. Y.

CONCLUSIONS OF LAW.

First. That the nearest entrance to a building occupied exclusively as a dwelling specified in the statute, is the nearest entrance, whether rear, side or front, to said dwelling, measured in a straight line, from the nearest public entrance to the building in which traffic in liquors is proposed to be carried on.

Second. That the nearest entrance to the building in which traffic in liquors is to be carried on, under the statute, is any entrance through which the public enter the building as patrons of the business carried on therein.

Third. Where there is more than one distinct dwelling occupied by a distinct family embraced within one building, no part of which is used for any other purpose, each distinct dwelling, although under a common roof with others, constitutes one building occupied exclusively as a dwelling within the statute.

Fourth. That the Grossman house occupied by the two dress-makers, with the printed card or sign in the window, was not a building occupied exclusively for dwelling purposes. The card was an invitation for any person to enter who saw fit, and a good will might result from such an occupancy of a dwelling which would take from it its character of exclusiveness.

Fifth. That whether the front entrance alone be regarded as a public entrance to the building No. 314 West State street, or one or both of the side entrances be regarded as such, in neither case did the said Patrick J. Savage procure the written consents of the owners of two-thirds of the buildings occupied exclusively as dwellings, the nearest entrances to which were within 200 feet, measured in a straight line, of the nearest entrance to the building in which the traffic in liquor was to be carried on.

Sixth. If the front entrance be taken as the only public entrance, said Savage filed with his application the consent of the owner of the house occupied by the Jew, Sherris, and the consent of the owner of the Van Campen house, corner Second and State street, only, leaving the double house on Third street owned by Herse and the single dwelling on First street owned by Dickinson, not consenting.

Seventh. If the side entrance be considered a public entrance, then there were all the buildings previously enumerated, and in addition the second Dickinson house on Second street, and the Judge house on Third street, adding two to the total number, of which the applicant had but one, leaving the ratio of those not consenting greater than before.

Eighth. That liquor tax certificate No. 18,848 should be revoked and cancelled.

Ninth. That the petitioner recover of Patrick J. Savage, the respondent, his costs which are allowed at sixty dollars, and taxable disbursements in addition thereto.

Supreme Court, Erie Special Term, March, 1900. Unreported.

In the Matter of the Petition of HENRY H. LYMAN to Revoke the Liquor Tax Certificate of WILLIAM H. MCCARTHY.

KENEFICK, J. This is a proceeding under subdivision 2, section 28 of the Liquor Tax Law to revoke a certificate upon the ground that material statements in the application of the holder of such certificate were false. The respondent applied for a certificate on or about May 18th, 1899, and the same was issued on that date under subdivision 1 of section 11 of the Law, which is equally applicable to saloons and hotels. The form of application to carry on the business either as a saloon or as a hotel is the same, and is prescribed by section 17 of the law. Among the other things therein required to be stated in the application is,

“ 9. If the traffic in liquors is to be carried on in connection with the business of keeping a hotel, the applicant shall also show by his application that all the requirements of section thirty-one hereof defining hotels have been complied with.”

The respondent in his application for a certificate stated that he was to conduct a hotel in connection with the business of trafficking in liquors. He further stated therein in answer to question 26 thereof that the premises met the requirements of section 31 of the law as to hotels. The form of tax certificate issued either to a saloon or hotel is precisely similar.

The petition alleged that the answer to question 26 “was a material statement, and *was and is false*”: that the premises “*did not and do not* meet the requirements of section 31,” and then proceeds to point out wherein the premises did not and *do not* meet the requirements of section 31.

The answer was a general denial of all the allegations of the petition. A reference was ordered and this is a motion, upon the testimony returned by the referee, to revoke respondent's certificate.

The testimony on the part of the petitioner was given by two special agents of the State Excise Department, who testified in substance that in September, 1899, they examined the respondent's premises; that they found but seven bedrooms, of these but four were furnished; two of the unfurnished rooms did not have

independent access to a hallway, and a one-inch partition separated the last two mentioned rooms. It is manifest that the premises as they existed in September, 1899, did not meet the requirements of section 31. There is no evidence in the case to show whether the premises met the requirements of the law when the application was made and the certificate issued.

One of the special agents on cross-examination testifies that upon the occasion of this examination respondent told him that "originally there were more rooms in the hotel and they had been changed" and both special agents testified that respondent told them that he was not running a hotel any longer but a concert hall.

The respondent testifies in his own behalf that he was engaged in the hotel business on these premises and had been so engaged for three years; that prior to engaging in this business at that place the Excise Department had sent an inspector to examine his premises, and that this inspector had told him he had the necessary number of rooms to run a hotel; that in June, 1899, he caused changes to be made in and about the premises in regard to rooms, alterations, etc., and that after making such changes the premises were not in the same condition as at the time he made this application, and that in this application he did not knowingly make any false or fraudulent representations in regard to the conditions of the premises. He was not asked as to the conditions of the premises at the time the application was made nor was he asked as to the number of rooms it then contained, nor as to their location or furnishings.

In order to determine that these premises did not meet the requirements of the law when the application was made, and therefore that respondent had made material false statements in his application upon this subject, we must indulge in the presumption that the premises were the same in May, 1899, as the agents found them in September, 1899. What evidence there is in the case, although it is slight, tends to rebut that presumption, for it tends to show that the premises were altered between the issuance of the license and the time of the examination. Such a presumption is not allowable.

Assume that his premises originally met all the requirements of the law, but that after the issuance of the license he determined to use some of the bed-rooms for other purposes or otherwise alter the premises so that they did not conform to

the requirements of section 31, did such alteration divest him of the right to traffic in liquors under his certificate? Not at all. The law did not require him to report such alteration to the Excise Department, or to surrender up his certificate. He could still traffic in liquors, but he was denied the special privilege accorded under section 31 of the act to keepers of hotels which conform to the requirements of that section. If after such alterations *he availed himself of those privileges* he violated the law, and his certificate could be revoked *for such a violation*.

The revocation of this certificate is not sought because of any illegal sales of liquors. The sole basis of the proceeding is the alleged false statement in his application for a certificate.

The evidence does not warrant a determination that the statement was false when made, and when the certificate was issued.

For the promotion of substantial justice however, I have determined to permit the petitioner's attorneys to enter an order sending this proceeding back to the same referee for the purpose of permitting the petitioner to offer any evidence he may desire as to the condition of the premises when the application was made and the certificate issued; if, however, such an order is not entered within twenty days from the date of this memorandum respondent's attorney may enter an order dismissing the proceeding without costs.

Supreme Court, Monroe Special Term, March, 1900. Unreported.

In the Matter of the Application of W. L. SAUNDERS to Revoke
the Liquor Tax Certificate of HENRY GARNSEY.

NASH, J.: There was no building occupied as a dwelling within two hundred feet of the nearest entrance to Garnsey's premises at the time the certificate was obtained. There was a building in the course of construction within that distance, but it was not and had not been occupied as a dwelling, and could not have been so occupied at that time.

As to the other question, the evidence shows that at the time the certificate was obtained Garnsey had his hotel so far completed that he had the necessary six bedrooms with partitions of the required thickness, but the sash were not in the windows and

the doors had not been hung, and the partitions were not lathed and plastered. The studding had been set up in the partitions of the bed-rooms and covered with building paper. The windows were hung with curtains of the same material. The doors had tapestry hangings, so that the rooms were actually occupied by guests at night and continued to be so until the hotel was completed, about a month later.

It is not questioned but that Garnsey was at the time he obtained the certificate engaged in good faith in the work of completing the construction of a hotel complying in every respect with the provisions of the law, and that it was finished and completed within about a month thereafter.

The case of Purdy (40 App. Div. 133) is controlling on this point. There the respondent had not completed his hotel at the time he obtained his certificate. He had not the requisite number of bed-rooms, but had the space for them and was engaged actively in good faith in preparing them, and the rooms were actually completed and furnished in the manner required by law within a month of the time when the certificate was granted. Held sufficient to entitle the respondent to retain his certificate.

An order may be entered confirming the report of the referee and denying the application of the petitioner with costs, twenty-five dollars and disbursements.

Supreme Court, New York Special Term. Reported N. Y. L. J., March 27, 1900.

In the Matter of the Application of WALTER H. VAN VLECK to
Revoke the Liquor Tax Certificate of JOHN E. COONAN.

BISCHOFF, JR., J.: The statute recognizes a consent which specifies no term, for the failure to state a term imports a consent to an unlimited term (Liquor Tax Law, section 17, sub. 8.) The questions of fact arising under the petition and answer are: (1) Did the alleged owner, John Hild, acknowledge his consent? (2) At the time of the application for the certificate, were more than twelve buildings within 200 feet of the applicant's premises used exclusively as dwellings, and, if so, what number were so used? (3) Did the applicant file, together with his statement,

consents duly acknowledged of owners of two-thirds of the buildings within 200 feet of his premises, which were at that time occupied exclusively as dwellings? As to these facts, the moving papers, so far as *prima facie* sufficient are properly rebutted, and a reference to take and report the proofs will be ordered. Settle order on notice.

Supreme Court, Queens Special Term, March, 1900. Unreported.

PEOPLE ex rel. JOSEPH FALLERT BREWING COMPANY, Ltd. v.
HENRY H. LYMAN.

Guggenheimer, Untermeyer & Marshall, for relator.

William E. Schenck, for respondent.

GARRETTSON, J.: Respondent's preliminary objection should be overruled. The surrender receipt issued by the county treasurer, a copy of which is attached to the petition is in conformity with section 25 of the Liquor Tax Law.

Compliance by the holders of the certificate with the conditions prerequisite to the issuance of such receipt, may be presumed. It must also be presumed that the county treasurer issued the certificate only after such compliance.

Applying the rule that a denial upon information and belief raises no issue of fact upon an application for a peremptory writ of mandamus, the relator has presented a case which entitles him to the writ unless it shall be held as a matter of law, that under his admission of the arrest of Esther Samuels, one of the holders of the certificate, for an alleged violation of the Liquor Tax Law, within thirty days after the surrender of the certificate, her discharge from such arrest by the city magistrate court is not a dismissal of such proceeding against her, "on the merits." So far as the record shows, Esther Samuels is not now under arrest, or held to answer for a violation of the law, and her discharge was made for the reason, as stated in the certificate of the clerk of said court, attached to the petition in this matter, that "there was not sufficient evidence to hold defendant." In other words, it was determined by the magistrate upon the examination that from the evidence adduced before him, there was not reasonable, or

probable cause to believe that she had committed the offence with which she had been charged, and for which she had been arrested. Ordinarily this would be the final disposition of a complaint for the commission of a crime. If the People had sought to further prosecute, a new proceeding should have been instituted upon additional evidence, which course has not been pursued. If she had not been exonerated, there is no way open to her in criminal procedure, by which she can seek and compel a more meritorious disposition of the charge made against her.

In my opinion the charge was dismissed "on the merits" within the meaning of the section above cited. There is nothing in the affidavits of John C. McDonough and Robert G. Woods, attached to respondent's answer, which can operate to defeat this application.

It is fairly to be inferred, that for the alleged violation of the law therein set forth, Esther Samuels was arrested and the proceedings before the magistrate were had. The statute speaks of an arrest or an indictment, not of a complaint by a special agent to the state commissioner or the district attorney. These affidavits set forth an alleged violation of the law on September 2d, 1899, and notice thereof to the district attorney on September 9th.

The arrest upon the magistrate's warrant was made on September 26th.

The motion for a peremptory writ of mandamus as prayed for is granted with \$25 costs.

Supreme Court, New York Special Term, March, 1900. Reported.
30 Misc. 663.

Matter of the Application of JAMES HARPER for an Order Revoking and Cancelling the Liquor Tax Certificate Granted to JULIUS KELLER.

1. Liquor Tax Law—Good faith can not assist a false statement in the application.

The good faith of the applicant, for a liquor tax certificate, in making a material statement in his application which was false when made, is not a defense to an application to cancel his certificate made under subdivision 2 of section 28 of chapter 112 of the Laws of 1896.

2. Same—Exemption of place occupied as a hotel on March 23, 1896.

The exemption, as to consents, conferred by subdivision 8 of section 17 of said act, upon a place occupied as a hotel on March 23, 1896, is not given to a place then occupied as a boarding-house.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

Ritch, Woodford, Bovee & Wallace, for petitioner.

No other appearance.

FITZGERALD, J. This application is made under subdivision 2 of section 28 of the Liquor Tax Law (Chap. 112, Laws of 1896), to cancel the certificate of Julius Keller at No. 128 East Twenty-eighth street, on the ground of false material statements in his application, on faith of which the certificate was issued.

The application contained the statement that within the two hundred-foot limit specified in the statute there were no buildings exclusively occupied as dwellings, and the consents of owners, which are required by the law to be annexed to the application, in case there are such buildings within the limit, were lacking from this application. Respondent's answer to the allegation of the petition is: *First*. That the application stated the truth. *Second*. That it was made in good faith, and *Third*, that in any event, the premises were, prior to March 23, 1896, and on that day, and ever since, occupied as a hotel.

These issues were sent to a referee to take the evidence and report to the court. The referee has filed his report, and the proceeding is before me under the practice prescribed in section 28, subdivision 2 of the Liquor Tax Law, to determine upon the evidence. It was conceded upon the argument that there were buildings occupied as dwellings within the two hundred-foot limit specified by the statute, and that the statement of Keller to the contrary in his application was false. It was insisted, however, that Keller acted in good faith in making this statement. Whether he did or not is immaterial if the statement itself is untrue.

This brings us to a consideration of respondent's other defense, which raised the issue that the premises were a hotel on and after March 23, 1896. Section 17, subdivision 8, of the Liquor Tax Law provides, *inter alia*, that consents shall not be required

for any place described in said statements, which was occupied as a hotel on the 23d of March, 1896, notwithstanding that traffic in liquors was not then carried on thereat. Section 31 of the same act defines the term "hotel" as used therein. Without going into a discussion of the voluminous evidence taken before the referee, I am of opinion that the respondent has failed to establish his contention that the premises in question were occupied as a hotel on or before March 23, 1896; that, on the contrary, the place was merely a boarding-house; and for the reason that the certificate was issued upon the faith of false material statements in respondent's application, the motion to revoke and cancel the said certificate must be granted.

Motion granted.

Supreme Court, Onondaga Special Term, March, 1900. Reported.
30 Misc. 682.

Matter of the Application of EUGENE SULLIVAN for a Special Town Meeting in the Town of Volney, under the Provisions of Section 16, Liquor Tax Law.

1. Liquor Tax Law—Resubmission of local option—Town clerk's call of special town meeting.

Where an attempt to resubmit the question of local option to town electors has been held irregular, and a proper petition of electors for another submission at a special town meeting, as well as a petition to procure an order for calling such meeting, are filed with the town clerk on the same day, the impossibility of his calling the meeting within five days from the filing of the electors' petition, as required by statute (Laws of 1896, chap. 112, § 16, as amended by Laws of 1899, chap. 398, § 1), does not affect the validity of an order which directs the calling of such meeting, as, under such circumstances, the clerk has no right to call a meeting until the court has ordered it.

2. Same—Special town meeting may be held at any time.

A special town meeting for such a purpose may be called at any time. The statutory provision of said section 16, that it may be called at any time during an even-numbered year after 1899 "provided said even-numbered year be the second year succeeding the year when said four propositions were last or might have been lawfully submitted," is permissive merely, and will not be regarded as mandatory where a strict construction of the clause would, for two years, deny the electors the right to vote upon the questions of resubmission and local option.

APPLICATION for a special town meeting under the provisions of section 16 of the Liquor Tax Law.

F. G. Spencer, for petitioner.

S. B. Mead, for town clerk and others.

Piper & Rice and *C. G. Baldwin*, in opposition to application.

HISCOCK, J.: At the regular town meeting, town of Volney, Oswego county, in November, 1899, an attempt was made to submit the four propositions defined by section 16, Liquor Tax Law (Laws of 1896, chap. 112, § 16, as amended by Laws of 1899, chap. 398, § 1), to a vote of the electors of that town. This court has held that for reasons, which it is unnecessary here to state, said propositions were not properly submitted. The petitioner now seeks an order of this court authorizing or directing a special town meeting at which said propositions may be properly submitted. It appears without dispute that a petition proper in form and signed by the requisite number of electors asking for such meeting and submission has been duly filed with the town clerk. The opposition to the granting of the order sought and to the holding of such special meeting is based upon certain clauses in said section 16, which it is claimed prohibit the same.

The first ground of objection is found in the clause which says that "in the case of the calling of any special town meeting under the provisions of this act upon filing the petition hereinbefore mentioned and described with the town clerk, such clerk shall within five days after the filing of such petition call a special town meeting at a time not less than twenty days nor more than thirty days after the filing of such petition. The town clerk shall within five days cause to be printed and posted" notices, etc.

The petition of the electors for another submission was filed with the town clerk January 8, 1900. The petition in this proceeding was made the same day, and the hearing of the application thereon noticed for the Special Term held January twentieth. The town clerk has not complied with and now of course can not comply with the literal wording of the clause just quoted saying that he shall institute proceedings for the holding of the special town meeting within five days after the filing with him of the electors' petition therefor. I think this clause, however, must be read and construed in connection with the other provisions of the

section. One of them is that "Such special town meeting shall only be called upon the filing with the town clerk, the petition aforesaid and upon an order of the supreme or county court or a justice or judge thereof respectively upon sufficient reason being shown therefor." In other words, after the petition had been filed with him, as in this case, the town clerk had no right to comply with the other provision directing him to make a call within five days. He was obliged to wait until the requisite order should be obtained before he could make any call at all, and I think that the time occupied in obtaining such order should not be counted as part of the time limited for his calling the meeting. Of course a literal compliance with both provisions could be secured by withholding the filing of the petition with the town clerk until application had been made for the necessary order, or by obtaining such order *ex parte* and without notice to anybody, which could probably be done within five days. I think either of these courses would be objectionable, and that it is better to construe the provisions as I have done. The proper place for the petition when executed is with the town clerk, where any person interested can inspect it, and the fact that it is there ought to appear when application is made for the order. Nor is it desirable that an order of this kind, involving at least considerable expense to the town if a new election is directed, should be granted without notice to be filed with the petition.

The second objection to this application is based upon the clause in section 16, which reads: "A special town meeting may be called at any time during an even-numbered year hereafter, provided said even-numbered year be the second year succeeding the year when said four propositions were last or might have been lawfully submitted."

The meeting which the petitioner desires to have called is clearly designated by the provisions of this section as a "special town meeting." The regular town meeting at which the attempt was made to submit these propositions occurred in November, 1899. Therefore, if the provision last quoted is to be regarded as fixing and limiting the time when a special meeting may be held to vote again on these propositions, as it is claimed by counsel it does, there never can be held such a meeting. For it will be impossible of course to get an even-numbered year which will be the second year succeeding 1899, when the propositions "were last or might have been lawfully submitted."

Again, however, I do not think the restrictive or prohibitory construction contended for is to be adopted. I confess I do not discover what the purpose of this clause is or what object it answers except to confuse and obscure the meaning of this section, which is sufficiently involved at best. Before it occurs a complete method is pointed out for securing a special meeting at which the nullifying effects of an irregular or improper submission of the excise propositions at a regular town meeting can be remedied by a new vote. No time is fixed within which this special meeting may or must be called except that the town clerk must act within a certain time after the filing of the electors' petition.

The section under discussion in its first provisions fairly indicates the expectation that such meetings will be called at any time and at irregular periods. This is to be expected from the mere fact that the meetings are special ones. If they were to be held at regular prescribed times there would be no sense in having the provisions at all. This intent is also to be gathered from another special provision. Provision is made for the submission of these questions every second year. Then occurs the provision for a special meeting in such a contingency as exists in this town. Then follows a clause that "the time for the resubmission of such propositions shall be reckoned from the date of holding the regular town meeting at which they should have been submitted." The "resubmission" here provided for is clearly the regular biennial one above referred to, and in providing that the computation of the time for its occurrence is to be reckoned from one regular annual town meeting to another similar one, the statute undoubtedly contemplates that special meetings may be held at irregular dates during such regular periods.

The general intent and purpose of the statute is that the electors shall have an opportunity at least once in two years to vote upon these questions, and that they shall not be deprived of this opportunity for a whole period of two years because mistakes have been made in the conduct of an election. Take this case as an illustration. As I understand it the real contest in the town at the November election was over the selling of liquors by saloons and hotels. A large number of inhabitants of the town are opposed to sales by either. At the election two years before this one the vote was in favor of selling at least by hotels. The last or 1899 election has been held irregular. The question,

therefore, presents itself whether if there cannot be a special election the hotels will not be entitled to a continuance of their right to sell liquor under the prior election and without any opportunity to the electors to pass upon that question for another period of two years. In fact, that is substantially the position taken upon this hearing by the counsel who really represents the opposition in the town to the sale of liquors.

I think it would be unfortunate by giving the construction claimed for the clause first quoted upon this last point, to bring about a denial to the electors of Volney of the right to vote upon and regulate these questions as it was the intention of the statute they might do. The wording of the clause in question quoted is permissive merely. The authority for such meetings without any such limitations is found in the earlier provisions of the section. It does not seem reasonable or necessary by giving the later words a prohibitory instead of a permissive construction to limit what precedes them and thus overturn the general purpose of the statute.

The application, therefore, is granted.

Application granted.

Supreme Court, New York Special Term, March, 1900. Reported 31 Misc. 44.

Matter of the Petition of JOSEPH AUERBACH to Revoke and Cancel
The Liquor Tax Certificate No. 6,615, Issued to JOHANNES M.
JOHANNSEN.

Liquor Tax Law—Revocation of certificate for false answers—Reference refused.

A liquor tax certificate will be revoked, for false answers to the application, where the holder does not deny by affidavit the verified allegation of the petitioner for revocation that the answer to the question, whether he was entitled to traffic in liquors, was false in that he had not obtained the requisite consent of property owners of buildings, used exclusively for dwellings, within the statutory two hundred foot radius.

Where the denial of the holder is only in the form of a pleading, the court will revoke the certificate without appointing a referee to take testimony and report.

APPLICATION under subdivision 2 of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112) to revoke a license heretofore

issued to Johannes M. Johannsen on the ground that the liquor tax certificate was issued upon an application in which the applicant made false answers.

William S. Gordon, for petitioner.

LAWRENCE, J.: This is an application under subdivision 2 of section 28 of the Liquor Tax Law, to revoke a license heretofore issued to Johannes M. Johannsen on the ground, among others, that the liquor tax certificate was issued upon an application in which the applicant made false answers. In the view which I take of this case it is not necessary to consider all the answers which are alleged to be false. In answer to question 13 as to whether the applicant was entitled to traffic in liquors on the premises in question, the applicant answered, "Yes." It appears from the affidavits read on the motion that this statement was false, because two-thirds of the property-owners of all the buildings used exclusively for dwellings within 200 feet of the nearest entrance to the saloon premises did not assent to the applicant obtaining a certificate for the purpose of carrying on the sale of liquors. § 17 of the Liquor Tax Law, subd. 8. In answer to a subsequent question, respondent said there were no buildings exclusively used for dwelling purposes with 200 feet of the nearest entrance to the saloon premises. The petition and affidavits show that there are several of such dwelling-houses within the prescribed limits (see petition and affidavits attached). Although the respondent denies the allegations in the petition in regard to the falsity of his answers, he presents no affidavit in opposition to the petitioner's affidavits as to the location of his premises being within 200 feet, measured in a straight line to the nearest entrance to several buildings used exclusively for dwellings. Such being the case, I do not think that a reference is necessary. See *Matter of Bridge*, 36 App. Div. 533.

Ordered accordingly.

Supreme Court, New York Special Term, March, 1900. Reported.
31 Misc. 46.

Matter of the Petition of JOSEPH AUERBACH to Revoke and Cancel
the Liquor Tax Certificate No. 6615, Issued to JOHANNES M.
JOHANNSEN.

Liquor Tax Law—Stay not granted after cancellation of certificate.

Where an order, cancelling a liquor tax certificate for false answers in the application, has been entered and served, the court has no power to stay proceedings, pending an appeal from the order, as it is self-executing and upon its entry and service the rights of the holder cease by statute.

PROCEEDINGS under the Liquor Tax Law (Laws of 1896, chap. 112) to revoke and cancel a liquor tax certificate. Motion by respondent for a stay of proceedings, pending an appeal.

William S. Gordon, for petitioner.

BISCHOFF, J.: After entry and service of an order cancelling a liquor tax certificate in a proceeding instituted under section 28 of the Liquor Tax Law, the respondent seeks a stay of proceedings pending his appeal from the order, but it appears that a stay can not affect the situation and the motion should, therefore, be denied. Under the provisions of the Liquor Tax Law, § 28, subd. 2, the order is self-executing, and upon its entry and due service the rights of the holder by virtue of the certificate "shall cease." Therefore, a stay, operating only upon future proceedings, can not affect the legal status of the party as already fixed by law, and, with or without a stay, his further acts under the certificate would be in violation of the penal provisions of the statute. Application denied, with ten dollars costs.

Application denied, with ten dollars costs.

Supreme Court, Erie Special Term, March, 1900. Reported, 31 Misc. 100.

HENRY H. LYMAN, as State Commissioner of Excise, Plaintiff, v.
THOMAS H. CHEEVER and UNITED STATES GUARANTEE CO.,
Defendants.

**Liquor Tax Law—Surety liable where traffic is continued after surrender
of certificate—Demurrer.**

A complaint, by the State Excise Commissioner against a liquor tax certificate holder and his surety for a violation of the conditions of the bond, which alleges that the holder of the certificate was trafficking and continued to traffic, in liquors after he had surrendered his certificate, is not demurrable, as under a proper construction of the Liquor Tax Law, an attempt by the holder to surrender the certificate, without ceasing to traffic in liquors is ineffectual to exonerate the surety from the liability which he has assumed for illegal traffic in liquors.

DEMURRER to the complaint, upon the ground that it fails to state facts sufficient to constitute a cause of action.

Mead & Stranahan, for plaintiff.

Peckham, Warner & Strong, for defendants.

KRUSE, J. The action is brought to recover the penalty of a bond given by the defendant Cheever, as principal, and the defendant guarantee company, as surety, for a violation of its conditions by the defendant principal illegally trafficking in liquor.

It appears in effect by the complaint that the certificate issued to the defendant principal, permitting him to traffic in liquors, was surrendered for cancellation and rebate on or about September 1, 1898, and that the violations occurred thereafter in the same month.

The complaint alleges substantially that the defendant principal had not, at the time of this surrender, ceased to traffic in liquor, and that he did not cease to traffic in liquor thereafter.

The certificate would not, by its terms, expire until the first day of May succeeding the date of its surrender, for the Liquor Tax Law provides that the taxes under the provisions of that act shall be assessed yearly, commencing on the first day of May, and if the traffic is commenced after the first of May, the assess-

ment shall be for the balance of the year proportionately. Liquor Tax Law, L. 1896, chap. 112, § 12.

One of the provisions of the bond is that the defendant principal will not violate any of the provisions of the Liquor Tax Law while the business for which the certificate is given shall be carried on.

Section 25 of the Liquor Tax Law provides in substance that if the holder of a liquor tax certificate who is authorized to sell liquor under the provisions of the act, against whom no complaint, prosecution or action is pending, on account of any violation thereof, shall voluntarily, and before arrest or indictment for a violation of the Liquor Tax Law, cease to traffic in liquors during the term for which the tax is paid under such certificate, he may surrender such tax certificate, under certain other terms and conditions mentioned in said section, and which do not relate to any question involved or to be determined at this time.

It will thus be seen that the right to surrender such certificate is not absolute, but depends upon certain conditions therein named, and an attempt to surrender the certificate without ceasing to traffic in liquor is ineffectual, I think, to exonerate the surety.

It is further contended on behalf of the plaintiff that even if the defendant principal had ceased to do business at the time of the surrender, and violated the provisions of the Liquor Tax Law at any time during the next succeeding thirty days, the defendant principal would not only lose his right to the rebate, but that he and his sureties would be liable upon the bond given at the time of receiving the liquor tax certificate authorizing the traffic in liquors.

The Court of Appeals have held that neither the licensee nor his assignee is entitled to the rebate if the licensee violates the provisions of the Liquor Tax Law within the thirty days after this tentative surrender (*People ex rel. Miller v. Lyman*, 156 N. Y. 407), but I am not aware that the question of the liability of the surety upon the bond for such a violation has ever been decided. However that question may be determined, I am of the opinion that, under the allegations in this complaint alleging in substance that the defendant principal had not ceased to traffic in liquor, as the act requires, the liability of the principal and surety upon this bond continued according to the original terms and conditions thereof.

The demurrer is, therefore, overruled, with costs, with leave to the defendants to answer within twenty days after entry of judgment and notice thereof, upon payment of costs.

Demurrer overruled, with costs, with leave to defendants to answer within twenty days after entry of judgment and notice thereof, upon payment of costs.

Third Appellate Department, March, 1900. Reported. 48 App. Div. 423.

In the Matter of the Petition of JOHN BARNARD, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 23,486, Issued to CHARLES RIVERS, Appellant.

Liquor tax certificate—The character of the traffic is determined by the application therefor—Revocation of, for a false statement in the application—Not discretionary.

The right of the holder of a liquor tax certificate to traffic in liquor is confined to the particular character of traffic set forth in the application for the certificate, although the certificate contains no such restriction.

Upon an application for the revocation of a liquor tax certificate because of an alleged false statement in the application therefor, the truthfulness of the statement in question should be determined as of the time when the application was made.

Semble, that the court has no discretion in this respect.

APPEAL by Charles Rivers from an order of the Supreme Court, made at the St. Lawrence Special Term and entered in the office of the clerk of the county of Washington on the 6th day of January, 1900, granting the petitioner's motion to revoke and cancel liquor tax certificate No. 23,486 issued by the State Commissioner of Excise to Charles Rivers, and also from the judgment entered in the office of the clerk of the county of Washington on the 6th day of January, 1900, upon said order.

R. O. Bascom and *James M. Whitman*, for the appellant.

A. D. Arnold, for the respondent.

KELLOGG, J. The applicant, Charles Rivers, for a liquor tax certificate to be issued to him under the provisions of section 11,

subdivision 1, of the Liquor Tax Law (Laws of 1896, chap. 112), made his application on the form provided by the State Commissioner of Excise and furnished him by the county treasurer of Washington county, and this form was the form provided for applicants desiring to traffic in liquor in connection with the business of keeping a hotel in the town of Kingsbury. The tax certificate was issued to him. This certificate does not on its face restrict the holder to traffic in liquor in connection with the business of keeping a hotel; it is in the form prescribed by the Liquor Tax Law, and declares that it is issued under subdivision 1 of section 11.

The order revoking the certificate proceeded upon the proof before the court which seems to have established the fact that the applicant at the time of his application and at the time the certificate was issued was not possessed of a hotel answering the requirements of section 31 of the Liquor Tax Law.

The contention of the appellant is that, because the applicant, some five weeks subsequently and after these proceedings were started, was possessed of a hotel answering such requirements, this ought to be taken as a sufficient compliance and be treated as a sufficient defense to the charge of false statement in his application. I do not think the court has any discretion, but must judge of the truthfulness of the statement in the application as of the time when made and before the certificate is issued.

The applicant further contends that the certificate ought not to be revoked for the reason that on its face it does not restrict the applicant to the traffic in liquor in connection with the business of hotel-keeping, but under it he may do any kind of business which subdivision 1 of section 11 contemplates may be done; that because of the absence of proof before the court that the traffic in liquor in the town of Kingsbury had been restricted by vote, had as prescribed by the local option clause of the Liquor Tax Law, it must be presumed that there had been no restriction. And, notwithstanding that the applicant declared in his application his purpose to keep a hotel, and the traffic in liquor intended was to be connected with that business, still he could not be restricted to that. I think the learned counsel for the applicant is in error in this contention. The scheme of the Liquor Tax Law is not difficult of discovery and does not lead to complications of the nature suggested. The law provides for the issuance in one form of all certificates, but the certificate and the applica-

tion have a very close relation. The law provides that the blank form of application shall be furnished by the Commissioner of Excise (§ 15) and must be furnished to the applicant by the county treasurer (§ 17); that if the traffic is to be carried on in connection with the business of keeping a hotel, the application must contain a statement under oath that all requirements defining hotels have been complied with (§ 17, subd. 9); that the certified statement of the result of the vote under the local option clause must be filed with the county treasurer (§ 16, subd. 4), and that it shall not be lawful for the county treasurer or special deputy commissioner to issue any liquor tax certificate except in accordance with such vote. It is thus made clear that the treasurer and the special deputy commissioner are provided in advance with the requisite information as to the character of the traffic permissible in any town in the county. And only on the statement in the application as to the character of the traffic intended by the applicant can the treasurer or special deputy know whether a certificate may be properly issued. This, it seems to me, shows the close relation of the certificate to the application; that the traffic must, in all cases, be confined to that particular line and character of traffic set forth in the application itself, and the application and certificate together must be interpreted to mean a license to the applicant to traffic in liquor only in the field and to the extent declared in the application.

For these reasons, I think the order should be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Second Appellate Department, March, 1900. Reported. 48 App. Div. 484.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES L. BRIGGS, Respondent, v. HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, and FRANCIS M. CARPENTER, as County Treasurer of Westchester County, New York, Appellants.

Intoxicating liquor—Liquor tax, where a portion of an unincorporated village is included in an incorporated one—Proof as to the population of the incorporated village.

Where, after the State Commissioner of Excise, under the authority of subdivision 7 of section 11 of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897, has established the limits of an unincorporated village and caused an enumeration of the inhabitants to be taken, a portion of the territory in the unincorporated village is included in an incorporated village, the amount which must thereafter be paid for a liquor tax certificate entitling the holder to traffic in liquors in that portion of the unincorporated village which has been included in the incorporated village is determined by the population of the incorporated, and not by that of the unincorporated, village.

Where the petition for such a certificate alleges that the incorporated village, which was not in existence when the last State or Federal census was taken, was a village of the fourth class—which comprises villages containing less than 1,000 inhabitants—and the statement of the population of such village required by section 22 of the Village Law (Laws of 1897, chap. 414) fixed the population at 391, the petitioner is entitled to a liquor tax certificate upon the payment of \$100, which is the rate fixed for villages of less than 1,200 inhabitants.

APPEAL by the defendants, Henry H. Lyman, as State Commissioner of Excise of the State of New York, and another, from an order of the County Court of Westchester county, entered in the office of the clerk of the county of Westchester on the 13th day of May, 1899, directing the county treasurer of Westchester county to issue a liquor tax certificate to the relator upon the payment of \$100.

Walter S. Jenkins, for the appellants.

Alfred E. Smith, for the respondent.

WILLARD BARTLETT, J. The question to be determined in this proceeding is whether the relator must pay a liquor tax of \$200 or

only \$100. The answer to this question depends upon whether at the time when he applied for the certificate his hotel or inn was to be deemed situate in the incorporated village of Bronxville, or in the unincorporated village or hamlet of Tuckahoe.

For the purpose of determining the excise tax to be assessed in such a locality the State Commissioner of Excise is authorized to "cause to be taken an enumeration of the inhabitants of any hamlet or unincorporated village, after first having established a limit or boundary line around such hamlet or unincorporated village, within which limit or boundary line such enumeration may be taken." (Chap. 112, Laws of 1896, § 11, subd. 7, as amd. by chap. 312, Laws of 1897.) Acting under the power thus conferred upon him, the State Commissioner, on February 28, 1898, established a limit or boundary line around the unincorporated village of Tuckahoe, in Westchester county, and caused an enumeration of the inhabitants to be taken, which showed the population to be 1,814. In an unincorporated village thus delimited by the State Commissioner, as well as in an incorporated village, the excise tax upon the business of trafficking in liquors to be drunk upon the premises, is \$200 if the population is less than 5,000 and more than 1,200, but only \$100 if the population is less than 1,200.

(Chap. 112, Laws of 1896, § 11, subds. 1, 7, as amd. by chap. 312 of the Laws of 1897.)

The relator's inn was situated within the limits of the unincorporated village of Tuckahoe as fixed by the State Commissioner of Excise. In April, 1898, the territory in which his hotel stood was taken into the newly-incorporated village of Bronxville, which includes about one-third of the territory of the unincorporated village of Tuckahoe as established by the commissioner. Bronxville was organized under the Village Law of 1897 as a village of the fourth class — that is, a village containing not more than 1,000 inhabitants. (Laws of 1897, chap. 414, § 40.) In May, 1899, the relator tendered \$100 to the county treasurer of Westchester county, and applied for a liquor tax certificate, which was refused solely on the ground that \$200 was the amount properly payable by one who desired to traffic in liquor, to be drunk on the premises, in an unincorporated village like Tuckahoe, the population of which was upwards of 1,800.

We think that when the relator's premises became included in an incorporated village, with a population of less than 1,200, he became liable to pay an excise tax of \$100 only. The Liquor Tax

Law deals with three classes of places, (1) cities; (2) incorporated villages, and (3) hamlets or unincorporated villages. The population of a city or incorporated village is to be ascertained by the last State census or the last United States census; or, if not thus ascertainable, the State Commissioner of Excise is directed to cause an enumeration of the inhabitants to be taken. He may do the same thing in the case of a hamlet or unincorporated village to which he has set limits. (Chap. 112, Laws of 1896, § 11 subd. 7, as amd. by chap. 312, Laws of 1897.) But it does not seem to us that the plan of mapping out and maintaining districts, in localities where there were no village corporations, was intended to apply to any territory after it became included within the limits of an incorporated village. This conclusion is sustained by the language of subdivision 7 of section 11 of the statute, which provides that the limit established by the State Commissioner around an unincorporated village shall not be changed for a period of five years after the date of recording the same, "except such hamlet or unincorporated village become an incorporated village, with corporate limits and boundary lines different from those established by the state commissioner of excise, in which case such newly incorporated village may be enumerated as hereinbefore provided in this section." If the whole of the unincorporated village of Tuckahoe, as bounded by the State Commissioner, together with additional territory, had been taken into the incorporated village of Bronxville, so that the population of the incorporated village exceeded 5,000, thereby making the liquor tax \$300, it would hardly be contended that the tax was still to be assessed as for the unincorporated village of Tuckahoe. That hamlet would have then become an incorporated village with corporate limits and boundary lines different from those established by the State Commissioner, and would thus fall literally within the scope and operation of the clause which we have quoted. In the case supposed the whole of the unincorporated village would have been absorbed in a new village corporation. Here, however, only a part of Tuckahoe has gone into Bronxville, but that part, by reason of the new political character which it has acquired, occupies a new position under the excise system of the State. We are of the opinion that the incorporation of a portion only of a hamlet or unincorporated village, delimited by the State Commissioner, changes the status of such portion so that thereafter it must be regarded and treated as situated within

the limits of an incorporated village for the purposes of the Liquor Tax Law. We think the Legislature did not intend that a locality which had been taken from one of these non-corporate districts and put into an incorporated village should continue to be taxable as though it still remained in the district and had not become a part of an incorporated village.

But it is argued that the papers do not show that the newly incorporated village of Bronxville has a population of less than 1,200, and if the inhabitants exceed that number the relator is, in any event, liable to a tax of \$200. The population of Bronxville cannot be learned from the last State census or the United States census of 1890, because the village was not in existence when either was taken. The State Commissioner could cause the population to be enumerated under the 7th subdivision of the 11th section of the Liquor Tax Law above cited; but this duty he does not appear to have performed. His omission in this respect, however, should not compel the relator to pay a larger tax than the Legislature intended to impose in villages of the actual population of Bronxville, if the number of inhabitants there can be judicially ascertained. We think there is enough in the record to show that the population does not exceed 1,000. It is alleged in the petition, and not denied, that Bronxville was incorporated as a village of the fourth class, which class as already pointed out, comprises villages containing less than 1,000 inhabitants. The Village Law further requires that with the report of the incorporation of a village to be delivered to the county clerk and Secretary of State, the town clerk must deliver "a statement of the population of such village as it appears by the proposition for incorporation." (Laws of 1897, chap. 414, § 22.) This statement may be regarded as some evidence on the subject, and in the case of Bronxville it fixed the population at 391, as appears by an allegation in the petition, which is undenied. Under these circumstances, we think that the relator made out a case which entitled him to a liquor tax certificate upon the payment of \$100, and that the County Court made the proper order in the premises.

All concur.

Order of the County Court of Westchester county affirmed, with ten dollars costs and disbursements.

Third Appellate Department, March, 1900. Reported. 48 App. Div. 638.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MAHAR W. DECKER, Respondent, v. JEHIEL W. DECKER, County Treasurer of Sullivan county, Appellant.

Order affirmed, with ten dollars costs and disbursements.

All concurred.

No opinion.

Third Appellate Department, March, 1900. Reported. 48 App. Div. 638.

In the Matter of the Petition of HENRY H. LYMAN, for an Order Revoking and Cancelling a Liquor Tax Certificate, Issued to M. A. SUNDERLAND.

THIS is an appeal from an order revoking and cancelling liquor tax certificate in proceedings instituted under subdivision 2 of section 28 of the Liquor Tax Law.

J. W. Atkinson, attorney for appellant.

Only one of the offenses charged, to wit: the sale on Sunday, is a trafficking in liquors, the other alleged offenses are violations of the law, but not acts of trafficking in liquors, conviction for which cause a forfeiture of a certificate. (*People v. Chase*, 41 App. Div. 12.)

The alleged sale on Sunday by the holder of the certificate is not proven; there is no connection shown between holder of certificate and the person making the sale; even if such connection were shown, there must be two convictions of agent or servant before certificate can be revoked. (Subdivision 3, sec. 34, Liquor Tax Law.)

Forfeiture of the certificate follows only in the cases where there is a judgment of conviction. (*Matter of Lyman v. Malcolm Brewing Co.*, 160 N. Y. 96.)

William E. Schenck, attorney for respondent.

On appeal every reasonable intendment on questions of law as well as of fact is to be made in support of the judgment. (*Dainese v. Allen*, 45 How. 430; *Mellen v. Banning*, 76 Hun, 225.)

Upon motion for re-argument in the case of *In re Lyman v. Malcolm Brewing Co.*, 160 N. Y. 96, the obiter dictum that the the right to revoke a tax certificate depends upon a criminal conviction, was decided to be a question still open for discussion. (*In re Lyman v. Malcolm Brewing Co.*, 161 N. Y. 119.)

The holder of certificate is not entitled to trial by jury in proceedings to cancel and revoke. (*In re Lyman v. Erie Co. Athletic Club*, 46 App. Div. 387, affirmed, 163 N. Y. 552; see also *In re Livingston v. Shady*, 24 App. Div. 51.) Even if defendant had been entitled to jury trial he has, nevertheless, waived his right thereto. (*Adams v. Brady*, 67 Hun. 521; *Penn. Coal Co. v. Delaware Canal Co.*, 1 Keyes, 72; *Baird v. The Mayor*, 74 N. Y. 382; *Gleason v. Keteltas*, 17 N. Y. 491; *West Point Iron Co. v. Reymont*, 45 N. Y. 703.) Defendant was still the "holder" of such certificate within the meaning of that word as used in section 28. (*In re Lyman v. Fagan*, 26 Misc. 300; *In re Michell v. James*, 41 App. Div. 271.)

A party is not compelled to prove his case in conformity with the testimony of his first witness, and if such witness be or becomes hostile and denies the fact upon which the party relies to establish his cause of action, it does not preclude him from offering testimony in conflict therewith and in support of his pleading. (Am. & Eng. Ency. of Practice, Vol. 10, pp. 316, 317, and cases cited.)

The acts of defendant's husband in a part of the house wherein they both resided, must, under circumstances of case, be deemed acts of defendant. (*In re Michell v. James*, 41 App. Div. 271; *In re Kriegel v. Malone*, 28 Misc. 622; *In re Lyman v. Vccder*, 29 Misc. 524.)

Proof of sale by an agent in the principal's saloon is *prima facie* proof of a sale by principal. (*Amerman v. Kall*, 34 Hun, 126.)

Defendant was civilly liable for wrongful acts of her husband, her servant, or agent whether committed with or without her knowledge and consent. (*Smith v. Reynolds*, 8 Hun, 129; *Overseer of Poor v. Hall*, 20 Weekly Digest, 33; *Lee v. Village of Sandy Hill*, 40 N. Y. 448; Story on Agency, p. 563.)

The referee had no power to rule upon questions of evidence.

He was appointed solely to take the testimony and report to the court for its convenience. (Laws 1896, chap. 112, § 28, subd. 2 as amended by Laws of 1897, chap. 312; *For v. Moyer*, 54 N. Y. 125.)

Order affirmed, with ten dollars costs and disbursements.

All concurred.

No opinion.

Third Appellate Department, March, 1900. Reported. 48 App. Div. 639.

In the Matter of the Petition of HENRY H. LYMAN to Recover the Liquor Tax Certificates of PATRICK RYAN and Eleven Others.

It was stipulated by the parties that the appeals herein should be withdrawn, if the Court of Appeals held in the Matter of Campbell v. Robinett, that a conviction is not a condition precedent in order to give a court or judge jurisdiction to revoke and cancel a liquor tax certificate under subdivision 2 of section 28 of the Liquor Tax Law.

When the Court of Appeals affirmed the decision of the court below in Matter of Campbell v. Robinett (162 N. Y. 612, affirming 46 App. Div. 634), the parties defendant refused to withdraw their appeals.

Ordered, that the appeal in each of these cases be dismissed, unless the appellant, within twenty-four hours after service of a copy of this order, withdraws the appeal therein in accordance with stipulation filed.

Second Appellate Department, March, 1900. Reported. 49 App. Div. 84.

In the Matter of the Petition of FRANK TONATIO, Appellant, for an Order Revoking and Canceling the Liquor Tax Certificate Granted to ANGELO DEPERINO, Respondent.

Liquor tax certificate—A false answer in a first application, referred to in an application for a renewal, vitiates the latter.

Where a person who has procured a liquor tax certificate, by making a false answer to a question contained in the application therefor, refuses to answer a similar question contained in his application for a renewal

thereof, upon the ground that, under subdivision 8 of section 17 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), he was not obliged to answer that question twice, the false statement in the original application vitiates the certificate issued under the second application.

APPEAL by the petitioner, Frank Tonatio, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 1st day of February, 1900, denying his motion to cancel liquor tax certificate No. 8,969 granted to Angelo Deperino.

John J. Clancy [*Henry Melville* with him on the brief], for the appellant.

Alfred R. Page, for the respondent.

WOODWARD, J. This proceeding was brought under the provisions of the Liquor Tax Law (Laws of 1896, chap. 112, § 28), as amended by section 19 of chapter 312 of the Laws of 1897, subdivision 2 of which provides that "any citizen of the State may present a verified petition to a justice of the Supreme Court, or a Special Term of the Supreme Court of the judicial district in which such traffic in liquors is authorized to be carried on, or in which the holder of such certificate resides * * * for an order revoking and canceling such certificate upon the ground that material statements in the application of the holder of such certificate were false, or that he was not entitled to receive or is not entitled, on account of the violation of any provisions of this law, conviction for which would cause a forfeiture of such certificate, or for any other reason, to hold such certificate. * * * If the justice or court is satisfied that material statements in the application of the holder of such certificate were false, or that the holder of such certificate was not entitled to receive, or is not entitled to hold such certificate, an order shall be granted revoking and canceling such certificate."

The proceeding was commenced by the service of an order to show cause, based upon the petition of Frank Tonatio, which alleged that on or about the 1st day of November, 1898, the respondent made his application statement in writing to the special deputy commissioner of excise for the borough of Brooklyn, wherein he stated that there were no buildings occu-

pied exclusively as dwellings within two hundred feet, measured in a straight line, of the nearest entrance of No. 9 Richardson street, the premises for which the certificate was sought. This statement is alleged to be untrue, for the reason that there were certain other buildings therein specified, which were alleged to have been at that time exclusively occupied as dwellings. The petition further alleges the compliance with the statutory requirements and the payment of the tax by the respondent, and that in reliance upon said statement liquor tax certificate No. 10,583 was, on or about the 12th day of November, 1898, issued to the respondent; "and, subsequently, by reason of the said verified statement and in reliance, as aforesaid, a certain other liquor tax certificate, No. 6,969, was on or about the first day of May, 1899, issued by the said Special Deputy Commissioner of Excise to" the respondent.

On the return day of the order an order of reference was made, and respondent filed an answer pursuant to said order, in which the allegation that the liquor tax certificate sought to be revoked was granted by reason of and in reliance upon the said statement was denied, and further, that the respondent had obtained and filed with the special deputy commissioner of excise the properly executed and acknowledged consent of more than two-thirds of the buildings alleged to be used exclusively as dwellings, the nearest entrance to which is within two hundred feet of No. 9 Richardson street. From the evidence taken before the referee it clearly appears that the respondent did make a false statement of a material fact in his original application; that, at the time of making the declaration required by subdivision 8 of section 17 of the Liquor Tax Law, as amended by section 10 of chapter 312 of the Laws of 1897, there were several such buildings, the nearest entrances of which were within two hundred feet, measured in a straight line, of the nearest entrance to the premises occupied by the respondent. It also appeared that in the declaration of the respondent, made upon the occasion of his application for the liquor tax certificate which is now sought to be canceled, he relied upon and specifically referred to his original declaration as the foundation for his right to the certificate now under consideration. Subdivision 8, referred to above, provides: "Whenever the consent required by this section shall have been obtained and filed as herein provided, unless the same be given for a limited term, no further or other consent for trafficking in liquor

on such premises shall be required, so long as such premises shall be continuously occupied for such traffic." When, on the occasion of the second application the respondent was asked questions bearing upon these points, he relied upon the previous application. It is admitted that no consents were filed as required by law until after the present proceeding was instituted, and on the 1st day of May, 1899, the respondent, in making the statement necessary to procure the certificate now under consideration, answered the questions submitted upon the blanks provided by the Excise Department, as follows:

16th question. "How many buildings occupied exclusively as dwellings are there, the nearest entrance to which is within two hundred feet, measured in a straight line, of the nearest entrance to the premises where the traffic in liquors is intended to be carried on?" Answer. "Renewal not required by law." (In the original statement he had answered "None.") 18th question. "Has the applicant attached hereto the consents required by section seventeen of said law?" Answer. "Not required by law." (In the original application he had answered "Yes.") 19th question (a). "If the applicant relies upon consents given heretofore, in what month and year and upon whose application statement were such consents filed?" Answer. "Application statement of applicant. Filed November 1, 1898." Question (b). "Do such consents given heretofore, together with those filed herewith, cover and relate to two-thirds of the above dwellings?" No answer.

With this state of facts before us we are unable to concur in the conclusion reached by the learned court below, that "The false application could not have been used to get the existing license. No part of the law to that effect is pointed out." Either the respondent had no right to the certificate by reason of his failure to show that the premises were not within the limits fixed by law, of buildings occupied exclusively as dwellings, or that he had the required consents, or else the original application was made use of in the procurement of the certificate. In either event the respondent was not entitled to the privileges secured by the liquor tax certificate.

It is plain that the respondent was proceeding under the provisions of the last clause of subdivision 8 of section 17 of the Liquor Tax Law as amended in 1897, and that the special deputy commissioner of excise understood that "no further or other

consent for trafficking in liquor on such premises " was required. The statement under which the present certificate was granted related back to the original declaration, and is merely a reassertion of the false statement of a material fact. It is an effort on the part of the respondent to gain rights under an original misrepresentation of material facts, and it should not receive the sanction of this court.

Matter of Johnson (18 Misc. Rep. 498) does not present a parallel case. There the respondent had in good faith procured the consents required by law, except that by an error in calculation he had only one-half instead of two-thirds of the owners of the buildings, and the error was corrected as soon as the matter was brought to his attention. The court, in the exercise of an equitable discretion, declined to revoke the license. In the case at bar there is an entire lack of evidence of good faith on the part of the respondent, who must have known the facts, and who made no effort to conform to the law until after the present proceeding was instituted.

The order appealed from should be reversed, with costs, and the liquor tax certificate should be revoked and canceled, and the appellant should be awarded costs in the several stages of the proceedings.

All concurred.

Order reversed, with ten dollars costs and disbursements, and application to revoke liquor tax certificate granted, with ten dollars costs.

Second Appellate Department, March, 1900. Reported. 49 App. Div. 99.

In the Matter of the Application of ANNIE FLANAGAN, Respondent,
for an Order Revoking and Canceling Liquor Tax Certificate
Number 22,204, Issued to JAMES HARRIS, Appellant.

Application for a liquor tax certificate—Incorrect description of the place where the traffic is to be carried on.

Where an application for a liquor tax certificate states that the traffic is to be carried on in the "front room, ground floor, side or end of building," a statement that the applicant has obtained the necessary consents can not be construed to relate to a one-room addition, which has been pried away from the building and moved to the rear of the lot after the application was made.

APPEAL by James Harris from an order of the Supreme Court made at the Queens County Special Term and entered in the office of the clerk of the county of Queens on the 25th day of July, 1899, revoking and canceling liquor tax certificate No. 22,204, granted by Charles L. Phipps, as county treasurer of Queens county, to James Harris.

Frederick L. Gilbert, for the appellant.

John B. Merrill, for the respondent.

HIRSCHBERG, J.: The application for a liquor tax certificate was made by James Harris on the 21st day of April, 1899. It purported to be accompanied, as required by section 17 of the Liquor Tax Law (Laws of 1896, chap. 112), as amended by chapter 312 of the Laws of 1897, by the consents of two-thirds in number of the owners of buildings occupied exclusively for a dwelling within 200 feet measured in a straight line of the nearest entrance. In answer to the question as to what particular place on the premises liquors were to be sold, the applicant answered "front room, ground floor, side or end of building." The applicant had leased the property April 20, 1899, and at that time it contained but a single building, a dwelling house with a small addition to it that was occupied as a kitchen. The kitchen addition, consisting of but one room, was thereafter pried away from the building and moved to the rear of the lot, and it is in this room that the applicant claims the right under his certificate to carry on traffic in liquors. The applicant stated in his application that attached thereto were the consents required by section 17 of the law. If the application is to be regarded as relating to the dwelling house as leased, this statement was untrue. If it is to be regarded as relating to the section of the dwelling house which has been pried off and removed to the rear of the lot, it may be true. The learned justice at Special Term decided that the removal of the small addition from the dwelling house to the rear of the lot was an afterthought, and was done to avoid the effect of his inability to secure the necessary consents. In this he was clearly correct. The statute requires (§ 17, subd. 3) a statement of the "specific location on the premises of the bar or place at which liquors are to be sold." The statement by the applicant, in compliance with this requirement, that it was to be in the front room on the ground floor, could not possibly refer

to a single and isolated room afterwards pried away from the building and carried to a remote corner of the lot.

The statement of the applicant that he had the necessary consents, and that they were attached to his application, was untrue, and being material brings the case within the terms of subdivision 2 of section 28 of the act, pursuant to which this proceeding has been instituted. He was not entitled to the certificate, and the court was justified in ordering its cancellation.

The order should be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Court of Appeals. Reported. 162 N. Y. 240.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE TOWN OF PLATTSBURGH, Respondent, v. ANDREW WILLIAMS, as County Treasurer of Clinton County, Appellant.

Liquor Tax Law—Disposition of revenue—Poor fund.

The requirement of chapter 125 of the Laws of 1898 (a local statute for the benefit of the poor of the town of Plattsburgh), that "all excise money arising from licenses granted in such town shall be deposited with the treasurer of the poor fund," is limited to the two-thirds which the Liquor Tax Law apportions to the town, and does not embrace the one-third which, by the terms of that law is required to be paid to the State.

People ex rel. Town of Plattsburgh v. Williams, 47 App. Div. 88, reversed.

(Argued February 28, 1900, decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered January 18, 1900, reversing an order of Special Term denying an application for a peremptory writ of mandamus and granting such writ.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

P. W. Cullinan, for appellant.

The act, chapter 125 of the Laws of 1898, purporting to authorize and direct the payment to the appellant of the entire

sum of said liquor tax moneys received by the county treasurer on account of the liquor tax certificates issued in the town of Plattsburgh, is null and void. (*People ex rel. v. Board of Suprs.*, 67 N. Y. 109; *People v. Wilmerding*, 136 N. Y. 363.) Even if it be conceded that the act of 1898 is operative and of full force and effect, yet it does not operate to compel the county treasurer to pay to the poor fund of the town of Plattsburgh one-third of the liquor tax moneys required by the provisions of the Liquor Tax Law to be paid to the treasurer of the State of New York. (Laws of 1896, chap. 112, secs. 13, 25; *People ex rel. v. Murray*, 149 N. Y. 367.) The reason and intention of the lawgiver will control the strict letter of the law when the letter would lead to palpable injustice. (4 Kent's Comm. 462; *Matter of Folsom*, 56 N. Y. 60; *Smith v. People*, 47 N. Y. 330; *Matter of R. W. Comrs.*, 66 N. Y. 413; *People ex rel. Keller*, 158 N. Y. 187.) If there be any apparent discrepancy or repugnancy between statutes such exposition should be made so that both may stand together. (*Chamberlain v. Chamberlain*, 43 N. Y. 424; *Bowen v. Lease*, 5 Hill, 225; *McCartee v. Orphan Asylum Soc.*, 9 Cow. 437.)

David H. Agnew, for respondent.

The entire sum of money received by the county treasurer of Clinton county for and on account of the issuing of liquor tax certificates in the town of Plattsburgh in said county for the year 1899, should be paid over to the town of Plattsburgh, pursuant to chapter 125 of the Laws of 1898, which amended section 3 of chapter 471 of the Laws of 1894. (*People ex rel. v. Bd. Canvassers*, 143 N. Y. 84; *Dwarris on Stat. Cons.* § 702; *Matter of City of Brooklyn*, 148 N. Y. 107; *People ex rel. v. Bd. Suprs.*, 67 N. Y. 109; *Ely v. Holton*, 15 N. Y. 595.) The act of 1898 repealed all acts inconsistent therewith, including chapter 112 of the Laws of 1896, as amended in 1897. (*Matter of Prime*, 136 N. Y. 347; *People ex rel. v. Comrs.*, 95 N. Y. 554; *Smith v. People*, 47 N. Y. 330; *People v. Green Co.*, 13 Abb. [N. C.] 424; *Gardner v. Collins*, 2 Pet. [U. S.] 93; *Rosenplaenter v. Roessle*, 54 N. Y. 262; 23 Am. & Eng. Ency. of Law, 299.) The act of 1898 and the act of 1896, as amended, are inconsistent and repugnant to each other and can not be construed *in pari materia* even as to one-third of the money for the reason the language used is unambiguous. (*Bowen v. Lease*, 5 Hill, 221; *Village of Gloversville v. Howell*, 70 N. Y.

287; 1 Kent's Comm. 46; *Fairchild v. Gwynne*, 16 Abb. Pr. 23; *Woods v. Bd. of Suprs.*, 136 N. Y. 411.) Every intendment is in favor of the constitutionality of a statute, that its enactment was a valid exercise of legislative power, and this though the natural interpretation of the language used in it would be to the contrary. (*Village of Gloversville v. Howell*, 70 N. Y. 287; *Roosevelt v. Godard*, 52 Barb. 533; *McDougall v. State*, 109 N. Y. 73; *People ex rel. v. Bd. of Suprs.*, 17 N. Y. 241; *People ex rel. v. Terry*, 108 N. Y. 7; *Bush v. Bd. Suprs.*, 159 N. Y. 212.)

HAIGHT, J.: The order of the Appellate Division directed the issuance of a peremptory writ of mandamus compelling the county treasurer of Clinton county to turn over to the town of Plattsburgh all of the liquor tax moneys received by him for the granting of liquor tax certificates in the town of Plattsburgh.

In 1896 the Legislature saw fit to make a radical change in the excise laws of the State. This was accomplished by the enactment of chapter 112 of the laws of that year, known as the Liquor Tax Law, by which it is provided that "One-third of the revenues resulting from taxes, fines and penalties under the provisions of this act, less the amount allowed for collecting the same, shall be paid by the county treasurer, and by the several special deputy commissioners within ten days from the receipt thereof, to the treasurer of the State of New York, to the credit of the general fund, as a part of the general tax revenue of the State, and shall be appropriated to the payment of the current general expenses of the State, and the remaining two-thirds thereof, less the amount allowed for collecting the same, shall belong to the town or city in which the traffic was carried on from which the revenues were received," etc. (Section 13.) By section 44 of the act the provisions of any special or local law, grant or charter in conflict with the act were repealed and annulled. (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 367.

Prior to the adoption of the Liquor Tax Law there existed local statutes providing that the excise money collected in the town of Plattsburgh should be turned over to the treasurer of the poor fund of the town to be used for the relief of the poor, as provided in the act. After the adoption of the Liquor Tax Law the Legislature enacted chapter 125 of the Laws of 1898, which is entitled "An act to amend section three of chapter 471 of the

Laws of 1894, entitled 'An act to amend chapter 435 of the Laws of 1879, entitled an act in relation to the raising of funds for the relief of the poor of the town of Plattsburgh, in the county of Clinton.' " So much of section three, as amended, as is material to the question under consideration, provides as follows: "All excise money arising from licenses granted in the town of Plattsburgh shall be deposited with the treasurer of the poor fund of said town by the county treasurer of said county within ten days after the receipt by him of the same."

It is contended that the provisions of this act require the county treasurer to pay over to the treasurer of the poor fund of the town of Plattsburgh all of the moneys arising from licenses granted in the town belonging to it, as well as the moneys belonging to the State. If this contention is sustained then the provisions of the act must be deemed to have amended the Liquor Tax Law, and to have appropriated from the treasury of the State the moneys belonging to it collected under the provisions of that act for the benefit of the general fund of the State. By referring to the title of the act it will be observed that it is a local statute for the benefit of the poor of the town of Plattsburgh. None of its provisions refer to or mention the Liquor Tax Law, or in terms purport to amend it, or to appropriate any of the money belonging to the State. In interpreting the meaning of statutes the rule is to give effect to the legislative intent. Such intent, we think, is clearly manifest in the enactment in question. In the absence of any provision appropriating the money belonging to the State, the provisions of the act being local, must be deemed to apply and have reference to "all of the excise money arising from licenses granted in the town of Plattsburgh," belonging to the town, and not to that which belongs to the State.

This construction of the local act leaves it in harmony with the provisions of the general act and sustains the general policy of the State, as disclosed through the Liquor Tax Law.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN and VANN, JJ., concur; LONDON, J., not sitting.

Order reversed, etc.

Court of Appeals, Reported. 162 N. Y. 612.

In the Matter of the Petition of JOHN D. CAMPBELL, Respondent,
for an Order Revoking and Canceling Liquor Tax Certificate
No. 24,279, Issued to WILLIAM F. ROBINETT, Appellant.

DANIEL O'GRADY, Special Deputy Commissioner of Excise,
Respondent.

Matter of Campbell, 46 App. Div. 634, affirmed.
(Argued February 27, 1900; decided March 13, 1900.)

APPEAL from an order of the Appellate Division of the
Supreme Court in the fourth judicial department, entered Janu-
ary 2, 1900, reversing an order of Special Term dismissing an
application for the revocation of a liquor tax certificate, and
granting such application.

Moses Shire, for appellant.

P. W. Cullinan and *L. H. Jones* for respondents.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., BARTLETT, HAIGHT, MARTIN, VANN and
LANDON, JJ. Not voting, O'BRIEN, J.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
April 6, 1900.

In the Matter of the Application of SAMUEL FEIST to Revoke the
Liquor Tax Certificate of CHARLES S. LOCKE.

BISCHOFF, JR., J. In opposition to the motion the respondent
contends that no evidence was given as to the condition and occu-
pancy of the buildings, as of the date when the application for the
certificate was made. Examination of the record shows that

direct testimony to this fact was brought out. While it was not necessary for the referee to make findings upon the evidence, his findings are supported by the proof, which is sufficient to justify the order prayed for in the petition.

Motion granted. Settle order on notice.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
April 11, 1900.

In the Matter of the Application of SAMUEL FEIST to Revoke the
Liquor Tax Certificate of CHARLES S. LOCKE.

BISCHOFF, JR., J. The term "costs" has a definite meaning, and can only relate to the items fixed by statute as allowable by way of costs. Under the Liquor Tax Law (sec. 28, subd. 2), "costs" may be awarded in a proceeding of this character "in such sums as in the discretion of the justice * * * may seem proper," but the measure of costs thus to be awarded must be limited in a special proceeding as in an action (Code, sec. 3240, to the items authorized by section 3251. "Costs" include disbursements (Code, sec. 3256), but nothing further, in the absence of an express provision for the award of an allowance in addition to costs.

Supreme Court, Cayuga Special Term, April, 1900. Unreported.

In the Matter of the Application of JOHN B. O'HARA for a Writ
of Mandamus.

Frank M. L Cary, for petitioner.

Frank E. Cady and *Robert L. Drummond*, for respondents.

NASH, J.: This is an application for a writ of mandamus requiring the election board which presided at the town election held in the town of Fleming, February 19th, 1900, to reconvene

and reject all ballots cast at the election upon the question of local option.

The fact that the town clerk did not post or publish notice of the election as required by law is admitted.

The petitioner relies upon the case of *Matter of Eggleston*, 51 App. Div. 38, in which it was held that prior to the amendment of the Liquor Tax Law in 1900, it was requisite that the notice required by the town law should be given. In the *Matter of Eggleston* the petition was directed to the town clerk and filed by him, but was thereafter taken by the county clerk and filed in his office, and no notice that the question would be voted upon at the town meeting was given. Two questions were determined by the court, as stated in the opinion: "First, that the petition must be filed with the town clerk; second, that he must give notice of the vote on local option as prescribed in the town law for propositions submitted to the electors of the town." Because of the failure to file the petition with the town clerk, and because of the failure to give the notice, a peremptory writ of mandamus was ordered, directed to the election officers, requiring them to reconvene and reject all votes cast at the election upon the question of local option.

Now, by the amendment of 1900, the Liquor Tax Law provides that the petition shall be filed with the town clerk, and that the town clerk shall give the notice. Both are expressly held in the *Eggleston* case to be jurisdictional, without which the election is invalid.

The *Eggleston* case arose under the Liquor Tax Law as it stood in 1899; it then provided, that, "If for any reason the four propositions provided to be submitted to the electors of a town shall not have been properly submitted" at the town meeting, they "shall be submitted at a special town meeting duly called." The amendment of 1900 provides that, if for any reason, "except for the failure to file any petition therefor," the four propositions shall not have been properly submitted, they shall be submitted at a special town meeting duly called. The only change being that there can not be a resubmission after an election, unless a petition was duly filed. In other words there can not be any submission of the question at a special town meeting unless the petition required by the statute has been filed. That seems to be the only significance of the amendment, and except as to that and the amendment of the Liquor Tax Law by which it is expressly

provided that the petition shall be filed with the clerk of the town, and the town clerk shall give the prescribed notice, the statute is in effect the same as when this precise question was before the court in the Eggleston case, which I must regard as controlling on this application.

An order may be entered directing that a peremptory writ of mandamus issue in accordance with the prayer of the petition, without costs, as the question under the present statute is new.

Supreme Court, Kings Special Term. Reported. N. Y. L. J., April 14, 1900.

In the Matter of the Petition of ALEXANDER WEINBERGER to
Revoke the Liquor Tax Certificate of JACOB GOLDBERG.

Abraham Miller, for petitioner.

Holm & Smith, for respondent.

MADDOX, J.: The averment in the petition (93) negatives the conclusion that the church property is used "exclusively as a church." It does not appear for what purpose the portion set apart for the sexton's use is or has been put to (see 9 Misc. 250; 14 Misc. 178).

Motion denied, but without prejudice to a renewal, if petitioner shall be so advised. No costs.

Supreme Court, Erie Special Term, April, 1900. Reported. 31 Misc. 285.

HENRY H. LYMAN, as State Commissioner of Excise, Plaintiff, v.
JOHN W. SIEBERT and UNITED STATES GUARANTY Co.,
Defendants.

Liquor Tax Law—Complaint against surety to recover penalties must show the time when the principal incurred them—Demurrer.

Under a bond conditioned that, if a liquor tax certificate be granted to the principal, he will not, "while the business for which such liquor tax certificate is given shall be carried on," violate any provisions of the

Liquor Tax Law, a complaint against the surety, for penalties recovered of the principal, is demurrable where it fails to allege the specific time when the violations in question occurred, or that they occurred while the business for which the certificate was given was being carried on.

DEMURRER to plaintiff's complaint.

Mead & Stranahan, for plaintiff.

Peckham, Warner & Strong, for defendants.

KRUSE, J. The plaintiff seeks to recover upon a liquor tax bond the amount of a judgment for fines and penalties recovered for violations against the Liquor Tax Law, by the principal in the bond, the defendant Siebert.

The complaint alleges that on August 16, 1898, Siebert was the holder of a liquor tax certificate to traffic in liquors at a certain place in the city of Buffalo, and about that time made application to permit him to transfer and carry on such business at another place in the same city, and did at the same time file the bond made and executed by the defendants, a copy of which is set forth in the complaint, and in effect alleges that the transfer was granted, and that the defendant Siebert at the time thereafter mentioned trafficked in liquor at the premises by virtue of the transfer so granted. The complaint then alleges "that thereafter, and on or about the 24th day of September, 1898, an action was commenced in the Supreme Court, Erie county, N. Y., in which this plaintiff, as State Commissioner of Excise, was plaintiff, and the defendant, John W. Siebert, was defendant, to recover the sum of \$300 for penalties incurred by said Siebert for violations of the Liquor Tax Law, committed at said premises where said traffic in liquors was carried on under said certificate, as aforesaid, and that thereafter and on or about the 8th day of March, 1899, judgment was entered in said action against said defendant, John W. Siebert, and in favor of this plaintiff, as State Commissioner of Excise, for the sum of \$557.39, being the sum of \$300 for penalties incurred for violations of the Excise Law, and \$257.39 costs and disbursements, as taxed and adjusted in said action, and that no part of said judgment has been paid."

The bond contains the condition, among others, that if the said liquor tax certificate applied for is given unto the principal, and the principal will not, *while the business for which such liquor*

tax certificate is given shall be carried on, violate any of the provisions of the Liquor Tax Law or any act amendatory thereof or supplementary thereto, the said principal will pay all fines or penalties incurred or imposed for violations of the Liquor Tax Law, and any judgment or judgments recovered or entered against the said principal for or on account of any such violation of said law, together with all costs taxed or allowed in any action or proceeding brought or instituted under the provisions of said Liquor Tax Law, then the above obligation to be void; otherwise to remain in full force and virtue.

While the complaint alleges that the action was brought to recover for penalties incurred for violations committed "at said premises where said traffic in liquor was carried on under said certificate as aforesaid," it is absolutely silent as to the specific time when these violations occurred, or that they occurred while the business for which said liquor tax certificate was given was carried on. Such a violation might have been committed at the premises before or after the time covered by this liquor tax certificate, and yet be within the allegations of the complaint.

Whenever time is an essential ingredient in a cause of action, or a particular period of time becomes material, the complaint should be definite and specific in that regard. To entitle the plaintiff to recover, these violations must have occurred while the business for which the liquor tax certificate is given shall have been carried on, as is stated in the bond, otherwise there is no liability, and the complaint should set forth specifically that these violations occurred during this period of time, for otherwise there is no breach of the conditions of the bond, and no liability has been established. I think the complaint is fatally defective in this regard.

The demurrer is sustained, with costs, with leave to the plaintiff to amend his complaint within twenty days after entry of the interlocutory judgment, and notice therefor, upon payment of costs.

Demurrer sustained, with costs, with leave to plaintiff to amend within twenty days after entry of interlocutory judgment, upon payment of costs.

Second Appellate Department, April, 1900. Reported. 50 App. Div. 544.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES SCHULER,
Appellant, v. ADAM E. SCHATZ, as City Judge of Mount Vernon,
Respondent.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. PATRICK CALLEN,
Appellant, v. ADAM E. SCHATZ, as City Judge of Mount Vernon,
Respondent.

Liquor Tax Law—A warrant for its violation may issue on the information of a police officer or of any citizen—An information charging that the accused did “sell or give away” liquor is defective.

A warrant for the arrest of a person charged with a violation of the Liquor Tax Law (Laws of 1896, chap. 112) may, under section 35 of that law, as amended by section 25 of chapter 312 of the Laws of 1897, be issued upon the information of a police officer or of any citizen having knowledge of the facts, and such information need not be first presented to the district attorney of the county.

An information charging a violation of section 31 of the Liquor Tax Law making it unlawful “to sell, offer or expose for sale, or give away any liquor: a. On Sunday,” which alleges that the accused “did sell or give away” liquor on a certain Sunday, is defective in that, being in the alternative, it fails to inform the accused of the specific offense with which he is charged.

APPEAL by Charles Schuler and Patrick Callen, the relators in each of the above-entitled actions, from orders of the county judge of Westchester county, entered in the office of the clerk of the county of Westchester on the 17th day of February, 1900, dismissing writs of certiorari.

George C. Appell, for appellants.

George C. Andrews, district attorney, for the respondent.

WOODWARD, J.: In view of the provisions of section 35 of the Liquor Tax Law (Laws of 1896, chap. 112), as amended by section 25 of chapter 312 of the Laws of 1897, the contention of the appellants that a committing magistrate has no jurisdiction to issue a warrant upon the information of a police officer, charging a violation of the Liquor Tax Law, without the intervention of

the district attorney, and without the information of such alleged violation having first been presented to the district attorney, is entirely untenable. The rule of law that where a statute prescribes a particular mode of prosecution, no other mode can lawfully be pursued, has no relation to the facts in this case, the provisions of section 37 of the Liquor Tax Law relating wholly to the duties of special agents, sheriffs, peace officers, etc., and in nowise limiting the jurisdiction of the courts. It would be a strange construction of the law creating misdemeanors in connection with the trafficking in liquors, to say that any citizen possessed of knowledge of violations of the law could not make an information before a magistrate and cause the arrest of such offenders without the information being first laid before the district attorney, especially when it is provided in section 35 that "a magistrate shall issue a warrant of arrest upon information and depositions and examine the case as now provided by law, but if it shall appear upon such examination that a crime, not triable by a court of special sessions has been committed, and that there is sufficient cause to believe that the person or persons charged with such crime is guilty thereof, such magistrate shall admit such person or persons to bail, in a sum not less than one thousand dollars, and in default of bail shall commit him or them to the sheriff of the county," etc. The fact that the person making the information now before us was a policeman does not change the rule governing the jurisdiction of the court or committing magistrate; the magistrate is directed to "issue a warrant upon information and depositions," and the question of his official position does not enter into the transaction. This makes it apparent that in the case of Callen the order appealed from should be affirmed.

The suggestion, however, that there is that degree of uncertainty in the information against Schuler which vitiates the warrant of arrest is, we think, well founded. By the provisions of section 31 of the Liquor Tax Law it is not "lawful for any corporation, association, copartnership or person, whether having paid such tax or not, to sell, offer or expose for sale, or give away, any liquor: a. On Sunday; or before five o'clock in the morning on Monday." The information charges that "Charles Schuler did sell or give away certain strong and spirituous liquors, to wit, ale and lager beer at his saloon on the northeast corner of Franklin avenue and Third street in the city of Mount Vernon,

N. Y. that said 7th day of January, 1900, being Sunday." We think that this information being in the alternative fails to inform Schuler of the specific offense with which he is charged; in fact, it charges no offense. (See *People v. Gilkinson*, 4 Park. Cr. Rep. 26.) In the case cited Mr. Justice EMOTT said that if it were alleged in an indictment that "the defendant sold rum, or gin, or brandy, that would leave it entirely uncertain what precise offence he had committed, or in what particular he had violated the law."

For this reason the order appealed from in the Schuler case should be reversed.

All concurred.

People ex rel. Schuler v. Schatz, order reversed; *People ex rel. Callen v. Schatz*, order affirmed.

Fourth Appellate Department, April, 1900. Reported. 50 App. Div. 622.

In the Matter of the Petition of GEORGE E. CHASE, Respondent, to Cancel the Liquor Tax Certificate No. 18,745, Granted to THOMAS A. PEREW, Appellant.

THIS is an appeal from an order of the Appellate Division affirming an order of the Supreme Court revoking and cancelling the liquor tax certificate granted to the appellant upon false statements that his hotel complied with the requirements of the Liquor Tax Law.

William S. Jackson, attorney for appellant: The court erred in excluding all evidence bearing upon the good faith and intent of defendant, as a defense. (*Matter of Purdy v. Driscoll*, 40 App. Div. 133; *Matter of Kessler*, 163 N. Y. 205, 207; *Matter of Johnson*, 18 Misc. 498; *Matter of Tonatio*, 49 App. Div. 84, 88; *Matter of Kinzel*, 28 Misc. 622, 626; *Matter of Bridge*, 36 App. Div. 533.) There was no material statement falsely made as the appellant's premises contained eleven bedrooms, and though a few lacked required space, they complied with the spirit of the law and substantially complied with the letter of the law. (*Matter of Lyman*

v. *Malcom Brewing Co.* 160 N. Y. 96; *In re Lyman v. Garrison*, 24 Misc. 552; *Matter of Lyman v. Young Men's Cosmopolitan Club*, 28 App. Div. 127; *People v. Adelphi Club*, 149 N. Y. 5; *Matter of Hilliard*, 25 App. Div. 222.) The certificate is property and the person receiving it has the same right to be protected in this property as in any other for which he has paid a valuable consideration and of which he is the owner. (*Matter of Purdy v. Driscoll*, supra; *Matter of Lyman v. Young Men's Cosmopolitan Club*, supra; *Matter of Kessler*, supra; *Matter of Johnson*, supra; *Matter of Tonatio*, supra.) The government, state or municipality may be estopped from availing itself of mere technical and formal irregularities when it has received benefits from a party acting in good faith. (*Clark v. U. S.*, 95 U. S. 539; *Solomon v. U. S.*, 19 Wall. 17; *Moore v. Mayor*, 73 N. Y. 238, 245, 247; *Davis v. Mayor*, 93 N. Y. 230, 253; *Carberry v. People*, 39 Ill. App. 506.) The petition was vitally defective in not alleging that petitioner was a citizen of the State of New York. (*People ex rel. Smaw v. McGowan*, 44 App. Div. 30; *Ladenburg v. Commercial Bank*, 87 Hun, 209, 271; *Standard v. Eytinge*, 33 How. Pr. 262; *Denton v. Town of Danbury*, 48 Conn. 368.

W. B. Simson, attorney for respondent: The court has the right to grant amendment to petition and especially so where the defendant appears and raises no objection and proceeds to contest the merits and no substantial right of the defendant is lost or affected by the amendment. (Sec. 723, Code of Civil Procedure; *Bibbe v. Wetimore*, 31 Hun. 424; *Raney v. McRae*, 14 Ga. 589; *Hall v. Mobley*, 13 Ga. 318; *Frozzell v. Duffer*, 58 Ark. 612.) An exception taken to a ruling of the court must be taken at the time the ruling is made in order to be available. (Sec. 995, Code of Civil Procedure.) The court properly excluded evidence of conversations between the appellant and the officer who issued his certificate as to subsequent alterations of the hotel to make it comply with law and of conversations between appellant and a special agent as to whether the same did comply with the law. They form no part of the contract between the State and the appellant. As the Trial Court says: "The State could not authorize the violation of its law in that way. They are there to enforce the law, not to wink at its violation." The Trial Court properly decided that "it is not necessary to prove any intent to violate the law on the part of

the defendant" to revoke his certificate for making a false statement in procuring the same. The case of *Matter of Purdy v. Driscoll*, 40 App. Div. 133 goes a good way further than the statute will permit.

Order affirmed with ten dollars costs and disbursements.
All concurred.

Fourth Appellate Department, April, 1900. Reported. 50 App. Div. 622.

In the Matter of the Petition of FREDERICK H. COMAN, Respondent, for an Order Revoking and Cancelling Liquor Tax Certificate No. 24,088, Issued to STRANAHAN DOWNER, Appellant.

This is an appeal from an order revoking the liquor tax certificate of the appellant.

JOSEPH P. SCHATTNER, attorney for appellant: It was neither alleged nor proven that appellant had been indicted and convicted for a violation of the statute, in a court having jurisdiction of crimes of the grade of felony. *Matter of Lyman*, 160 N. Y. 96. Sub. 2 of Section 28 of the Liquor Tax Law is unconstitutional, being in conflict with sections 1, 6 and 17 of Article I of State Constitution. It is also in conflict with section 1 article 14 of the amendments of the Constitution of the United States. There was no evidence that appellant was present when liquor was sold as charged, or knew or authorized its sale or that there had been two convictions of his agents.

L. H. JONES, attorney for respondent: The principal is liable in civil actions for the frauds, deceits and misrepresentations of his agent, committed in the course of the agent's employment, although principal did not authorize or participate in the transaction. (*Story on Agency*, Sec. 452; *Lee v. The Village of Sandy Hill*, 40 N. Y. 448; *Buffalo & Hamburg Turnpike Co. v. City of Buffalo*, 58 N. Y. 639, 642; *Maxmilian v. Mayor*, 62 N. Y. 160, 164; *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261; *Peters v. Mayor*, 8 Hun, 408; *Duffus v. Schwinger*, 7 Misc. 501; *Mahon v. Mayor*, 10 Misc. 666.) The principal is liable for the unlawful selling of spirituous liquor by an agent. *The United States v.*

Voss, 1 Cranch, C. C. R. 101; *The United States v. Conner*, 1 Cranch C. C. R. 102; *Hall v. McKechnie*, 22 Barb. 244 at 247 and 248; *Matter of Kinzel*, 28 Misc. 622 at 627. The doctrine intimated in *Matter of Lyman*, 160 N. Y. 96 that a conviction was a condition precedent to a revocation of a liquor tax certificate has been discarded by the Court of Appeals. (*Matter of Campbell v. Robinett*, 162 N. Y. 612.) An injunction to restrain the transfer or surrender of a liquor tax certificate during the pendency of a proceeding to revoke the same is not unconstitutional.

Order affirmed with ten dollars costs and disbursements. All concurred.

Fourth Appellate Department, April, 1900. Reported. 50 App. Div. 622.

In the Matter of the Petition of ROBERT SCOTT, Respondent, for an Order Revoking and Cancelling Liquor Tax Certificate No. 24,089, Issued to FRANK J. OPPENHEIMER, Appellant.

Order affirmed with ten dollars costs and disbursements. All concurred.

Fourth Appellate Department, April, 1900. Reported. 51 App. Div. 38.

In the Matter of WILLIAM EGGLESTON'S Objections to the Canvass of the Board of Town Canvassers of the Town of Dayton, in the County of Cattaraugus, and of the Canvass Precedent thereto, Made by the Inspectors of Election in Election Districts 1 and 2 in said Town upon the Question of Local Option.

WILLIAM EGGLESTON, Appellant; BOARD OF TOWN CANVASSERS OF THE TOWN OF DAYTON, etc., and Others, Respondents.

Local option—Submission of, to vote—The petition must be filed with the town clerk—He must give notice.

A petition for the submission of the question of local option to the electors of a town, which, by section 16 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1899, chap. 398), is required to be "filed twenty days before such town meeting with the officer charged with

the duty of furnishing ballots for the election," should be filed with the town clerk, who, at the time the Liquor Tax Law was enacted, was the officer charged with that duty, notwithstanding the fact that the Election Law (Laws of 1896, chap. 909) has created some confusion as to the officer upon whom that duty is now imposed.

It is incumbent upon the town clerk to give notice of the submission of the question to the electors in the manner prescribed by section 34 of the Town Law (Laws of 1890, chap. 569.)

APPEAL by William Eggleston from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Cattaraugus on the 20th day of December, 1899, denying the relator's application for a peremptory writ of mandamus directed to the several boards of inspectors of the town of Dayton, requiring them to reject all votes cast upon the question of local option at the last general election held in the said town.

N. M. Allen and J. S. Whipple, for the appellant.

James E. Birby, for the respondent.

SPRING, J. In the month of September, 1899, electors of the town of Dayton, in the county of Cattaraugus, comprising more than ten per centum of the number of votes cast at the general election in the fall of 1898, executed and acknowledged a petition requesting "that the question of excise as to license and no license may be submitted to the electors of said township for suffrage at the coming town meeting to be held in said township on Tues. Nov. 7, 1899."

This petition was directed to the town clerk of said town, and was filed by him on October 7, 1899, but was taken therefrom by the clerk of the county, by whom it was filed on the fourteenth day of October, and remained thereafter in his office. No other petition asking for such submission was filed by the town clerk, and no notices of election on such subject were posted by such officer. Town meetings in said county were held for the first time last year coincident with the general election, and ballots containing the four propositions specified in the Liquor Tax Law were submitted to the electors in the two election districts composing the said town of Dayton. Subdivision 4 of section 16 of the said law, which related to the authority of hotel-keepers to traffic in liquors, was defeated by two majority, and the relator

in this proceeding was the owner and proprietor of a hotel in said town. The two questions presented on this appeal are:

First. Is it necessary to file the petition of the electors for the submission of these questions with the town clerk?

Second. Must that official give notice of such submission within the requirements of the Town Law?

First. The determination of the questions involved depends upon the construction to be given to the Liquor Tax Law (§ 16, chap. 112, Laws of 1896, amd. by chap. 398, Laws of 1899), the Election Law (Chap. 909, Laws of 1896) and the Town Law (Chap. 569, Laws of 1890, amd. by chap. 481, Laws of 1897). Of course an effort should be made to harmonize, as far as possible, these three important enactments. Since they respectively became a part of the law of the State they have been continued in operation by various amendments, and the legislative intention to give effect to each of them is manifest, and that purpose should be respected by the courts. As was said by the Court of Appeals in *Matter of Taylor* (150 N. Y. 242) in construing two correlative statutes: "When both statutes can fairly stand and operate together, each performing an appropriate office, there is no repeal by implication."

By section 16 of the Liquor Tax Law provision is made for the submission of local option to the electors of the town every second year, and the submission of this question in the town of Dayton was an attempted fulfillment of this section. The section requires the petition of the electors desiring the submission of the four questions prescribed therein at the town meeting to be "filed twenty days before such town meeting with the officer charged with the duty of furnishing ballots for the election." Until this change in the law town meetings were held in the spring throughout the State, and the officer charged with furnishing the ballots was uniformly the town clerk. The record in this case does not show definitely what officer furnished the ballots for the submission of these propositions to the electors of the town of Dayton, nor has the question as to who was the proper officer to perform that duty been presented on this appeal by either of the learned counsel, and is not, therefore, before us. The solution of the questions pertaining to this appeal can be determined without deciding what officer was charged with the duty of furnishing the ballots.

Section 16 requires that this petition be filed with the proper

officer at least twenty days before the town meeting. The law, however, does not invalidate the election because of the omission to file this within the prescribed time. The act provides, "Whenever, through a failure to file any such petition within the time required by a town clerk in any town in which said petition was presented for filing, at least ten days prior to the time of holding the town meeting in said town," or where the town clerk shall be enjoined from providing ballots, said clerk shall call a special town meeting. The town clerk, it will be seen, is the officer to whom the duty is committed and with whom the petition must be filed. In fact, when this act was passed, it was clear and unmistakable that the town clerk was the officer charged with the duties of filing the petition, providing the ballots, etc. While the Election Law has created some confusion as to the proper officer to furnish the ballots, there is nothing in that law dispensing with the filing of the petition with the town clerk. That requirement is maintained in its integrity in the most recent amendments to the Liquor Tax Law, and despite the fact that the town meeting is now held simultaneously with the general election, and although the duty rests upon the county clerk of providing the official ballots containing the names of the candidates to be used thereat.

Second. But the vital practical advantage arising upon the filing of this petition is to enable the town clerk to give notice to the electors that these propositions are to be submitted to them to vote upon. This enactment contains no requirement as to giving notice of the submission of these questions to the electors. That was unnecessary, for the Town Law (Laws of 1897, chap. 481, § 13, amdg. Laws of 1890, chap. 569, § 26, and the acts prior thereto) imposed the duty upon the town clerk to give ten days' notice of any matter to be voted upon by the electors of the town except town officers. The requirement as to the filing of the petition must have been enacted with reference to this law, for the petition is to be filed at least twenty days prior to the voting pursuant to it. The county clerk is not charged with the duty of giving notice of the submission of these questions to the electors. He must send a sample ballot to the town clerk five days preceding the election which would afford but meagre notice to the electors of a rural community. The General Election Law obliges him to give public notice of all elections with the name and place of residence of each candidate and to furnish lists

to the town clerk (§§ 5, 61), and the latter functionary is required to post such lists of these nominations. (§§ 62, 63.)

There is, however, no provision in the Election Law making it obligatory upon the county clerk to give notice of town propositions or questions to be submitted to the electors. No provision is made in the Election or Town Law for advising the county clerk of any proposition to be voted upon which relates to the internal affairs of the town. The Town Law, however, provides that "No proposition or other matter than the election of officers shall be voted upon by ballot at any town meeting" unless "a written application plainly stating the question" shall be filed with the town clerk "at least twenty days before the town meeting." The town clerk is required to "give at least ten days' notice posted conspicuously in at least four of the most public places in town of any such proposed question, and that a vote will be taken by ballot at the town meeting mentioned." (Laws of 1890, chap. 569, § 34.)

Again, the Liquor Tax Law provides for only one petition, and if that must be filed in the office of the county clerk the requirement that ten days' notice be given of every proposition to be voted on at a town meeting is abrogated as to this statute. The town clerk has no information upon which to base his notice except the petition filed in his office. Certainly he would not be required to give notice relying upon common knowledge or incidental rumor acquired by him. This proposition as to notice is a very wholesome one. If the petition must only be filed with the county clerk, one-tenth of the electors can quietly cause their petition to be filed and the great body of the electors be ignorant that the liquor question is to be submitted to a vote. Our scheme of government designs that the fullest information be given to the electors of questions to be passed upon by them. It, therefore, seems reasonable to hold that the petition must be filed with the town clerk and the notice prescribed by the Town Law must be given. This is no infraction of the Election Law. The construction simply gives effect to the other enactments which are cognate with that law and must be construed in conjunction with it. Again, this preserves the town meeting as an independent entity. That institution is of ancient origin and interwoven closely with our system of government. In its very inception all matters affecting the town as a body were there passed upon, and that has always been one of its prominent features. The fact that

it is blended with the general election does not destroy its identity.

Enactments passed subsequently to the Election Law have retained the town meeting irrespective of its apparent absorption by the general election. (Chap. 363, Laws of 1898; chap. 594, Laws of 1898.) In no other statute is the town retained as a unit with greater precision than in the Liquor Tax Law. With all its radical changes in the Excise Law it preserved one principle intact, and that was local option. The right of the electors of the town to determine whether liquor should be sold within its boundaries had long been in force. That question had been an important one in the towns and, ordinarily, was unfettered by any party allegiance, and whatever tinge of political element had before existed was eradicated by this law, for the vote was not for the individual, but upon the proposition presented in the four questions.

We have, therefore, the Liquor Tax Law at the time it was framed recognizing the town clerk as charged with certain duties preliminary to the submission to the electors. That law was enacted, as I have stated, evidently to be construed in connection with the Town Law. These two enactments make the filing of the petition with the town clerk a necessity, and the ten days' notice by that officer obligatory the same as for any other local proposition to be submitted to the voters of the town, and there is nothing in the Election Law in any way repugnant to these requirements.

The history of the town meeting as an integral institution; its significance in all our excise legislation; the necessity of lodging the petition with the town clerk to insure notice to the electors; the fact that this official was actually charged with the duty of filing the petition when the act was passed, and that the Liquor Tax Law is to be construed in connection with the Town Law requiring notice to the electors, are cogent reasons for confining the execution of this part of the law to that officer.

As suggested above, we determine on this appeal only two propositions: *First*, that the petition must be filed with the town clerk; *second*, that he must give notice of the vote on local option as prescribed in the Town Law for propositions submitted to the electors of the town. We do not decide what officer is charged with the duty of furnishing the ballots, nor upon what ballots these propositions shall be printed when a town meeting is held

concurrently with the general election, nor whether a copy of the petition shall be filed with the county clerk or a notice of the filing be given to that officer by the town clerk. These questions may be important, but they are not before us for decision.

The petition preliminary to the submission of these propositions was loosely drawn and the manner of taking the acknowledgments by the notary showed like laxity. While we do not hold these defects necessarily render the petition insufficient, yet common prudence suggests a more circumspect compliance with the statute.

The order is reversed and a peremptory writ of mandamus ordered directed to the boards of inspectors and town canvassers of the town of Dayton, requiring them to reconvene and reject all votes cast in said election districts upon the subject of local option. No costs are allowed, as the questions involved are novel.

All concurred.

Order reversed and a peremptory writ of mandamus ordered directed to the boards of election inspectors and board of town canvassers of the town of Dayton requiring them to reconvene and reject all votes cast in said election districts upon the subject of local option. No costs are allowed, as the questions involved are novel.

Fourth Appellate Department, April, 1900. Reported. 51 App. Div. 52.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 11,843, Issued to CHARLES G. SPEIDEL, Appellant.

Liquor tax certificate—Failure to answer a question in an application therefor—It and not the certificate determines the rights of the applicant—Certificate canceled, although already surrendered—The duties of the officers issuing the certificate are ministerial.

An application for a liquor tax certificate made under section 17 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), which contains an affirmative answer to the question whether the applicant intends "to carry on a *bona fide* hotel on such premises,"

but fails to answer the question whether the premises "meet the requirements of section thirty-one of said law as to hotels," justifies, when the premises do not, in fact, meet with the requirements of that section, the cancellation of the certificate and a forfeiture of all rebate due thereon.

The fact that proceedings for a cancellation of the certificate are not instituted until after the applicant, upon learning that the Excise Department had discovered that the premises did not comply with the law, has surrendered the certificate and demanded the rebate for the unexpired term, does not prevent the cancellation of the certificate.

The failure of the applicant to answer the question is not excused by the lack of vigilance, if any, of the officer who issued the certificate.

Semble, that the duties of a deputy commissioner of excise or county treasurer in issuing a liquor tax certificate are ministerial in their nature. They can not refuse a certificate if the petition therefor shows that the applicant is entitled thereto under any provision of the act.

Semble, that the rights and obligations of a holder of a liquor tax certificate are derived from the statements of the applicant in his petition therefor and not from the certificate.

LAUGHLIN, J., dissented.

APPEAL by Charles G. Speidel from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 21st day of December, 1899, canceling liquor tax certificate No. 11,843, issued to him.

Moses Shire, for the appellant.

Mead & Stranahan, for the respondent.

SPRING, J. This proceeding was instituted October 22, 1899, by the State Excise Commissioner, but as a citizen of the State, pursuant to subdivision 2, section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), to revoke and cancel a liquor tax certificate issued to the defendant May 18, 1899. The defendant on that day presented to the Deputy State Excise Commissioner his application, and that officer issued to him the certificate, and thereafter he carried on a hotel at 395 Ellicott street in the city of Buffalo until October second, when he voluntarily surrendered the certificate and sought the repayment of the rebate for its unexpired term.

The defendant answered question No. 25 of his application, if he intended "to carry on a *bona fide* hotel on such premises," in the affirmative. The next question, No. 26, was if such hotel premises "meet the requirements of section Thirty-one of said

law as to hotels," and this was not answered. The pith of the attack upon the certificate is that the omission to answer this question affirmatively was in effect a false statement of a material fact. Section 31 defines what constitutes a hotel, prescribing the minimum number of rooms permitted, their construction, etc. Hence, the fact sought by that question is one of the essential requirements of the Liquor Tax Law pertaining to hotels, and the materiality of the omission is very significant.

Section 25 of the law, as amended by the act of 1897, permits the holder of a certificate, whose record is clear, to surrender the same to the officer who issued it and to receive the rebate or unearned value of the certificate for the full months it has to run. This rebate is paid by the State Excise Commissioner and is based upon the surrendered certificate, the petition for its cancellation and the duplicate receipt of the officer to whom such petition was made. The State Excise Commissioner does not repay at once. If within thirty days from the date of the receipt of the certificate by the State Commissioner the holder is arrested or indicted for a violation of this law, or if proceedings are instituted for the cancellation of such certificate within that period, the petition asking for the rebate "shall not be granted until the final determination of such proceedings," and if determined adversely to the petitioner, the "certificate shall be cancelled and all rebate thereon shall be forfeited."

It is obvious, therefore, that the holder of a certificate who, it has been judicially determined, has violated the law, cannot surrender the same and obtain the rebate. Whether he is attacked while openly engaged in its violation or within thirty days after notice of its surrender has been received by the department, its forfeiture follows its cancellation as the result of legal proceedings. This is essential to a wholesome execution of the law. Otherwise, the holder of a certificate who is flagrantly engaged in transgressing the law, if he surmises that he is to be proceeded against, could surrender his certificate and receive his rebate. If, however, the attack is made while he is carrying on the traffic the forfeiture would follow. There is no such inconsistency in the statute. That is well illustrated in this case. About the 27th of September, 1899, agents of the Excise Department called at the defendant's alleged hotel and made measurements of the rooms therein. It was patent that the hotel did not comply with the law. The defendant evidently understood that fact and

probably realized this action; presaged this proceeding at the instance of the deputy. To circumvent this and to insure the repayment of the rebate for the unexpired term, he surrendered his certificate for cancellation and demanded the rebate.

It is contended that the deputy excise commissioner in issuing the certificate was derelict in his duty, but that the certificate is a protection to the defendant nevertheless.

Section 17 of the law requires that the person desiring a certificate shall "prepare and make" upon a blank furnished therefor, a statement "signed and sworn to by such applicant" containing the facts which are set forth at large in that section. Subdivision 9 of section 17, as amended in 1897, provides that if the applicant intends to carry on the traffic in a hotel his application must show "that all the requirements of section thirty-one hereof, defining hotels, have been complied with." That is, these statements are preliminaries which must precede the granting of a certificate. The knowledge of the facts is with the applicant and the affirmative duty is with him to set them forth fully in his statement. He asks a privilege; the granting of that privilege depends upon certain facts which he must state and verify under oath; if he fails to do that he transgresses the law, even though the certificate has been issued to him.

It does not follow necessarily that the deputy commissioner of excise was delinquent in granting the certificate. By section 11 the excise taxes are divided into six grades. Subdivision 1 provides for the business of trafficking in liquors in a hotel, restaurant, saloon, etc. The tax imposed is the same under this subdivision whether the traffic is carried on in a saloon or in connection with a hotel. There is, in fact, no variation in the amount of the tax in this subdivision. The form of the certificate is also identical. (§ 20.) They all come within one grade. If the statement shows the applicant is entitled to a certificate, either as a hotelkeeper, saloon keeper or in a restaurant, the officer is obliged to issue it and it does not disclose in what capacity the traffic is to be carried on. So far as the certificate is concerned it is applicable to any one of the places enumerated in this subdivision. The deputy excise commissioner or county treasurer is not charged with the duty of discriminating one business from another, but must issue the certificate if the applicant shows he is entitled to it at all under this subdivision. This official's duties are ministerial. They are specifically defined in the statute. He

has no discretion. The petition is the basis for an attack upon the holder of the certificate. If the petitioner has applied for permission to traffic in liquor in a saloon he can not sell in a hotel. While the price and the form of the certificate are the same there are restrictions imposed and privileges accorded the possession of that license. If he disregards his petition and then sells in a hotel he does so in violation of the law and is amenable to punishment. The reason for this is not that he is violating the terms of his certificate but that he is selling contrary to the statements in his application.

In the application in this case the defendant said in answer to question No. 8 that he intended to carry on a hotel. He reiterated this in No. 25, but omitted answering the inquiry that his hotel complied with all the requirements of section 31 which in precise terms is made obligatory in subdivision 9 of section 17, as amended in 1897. He then carried on a hotel which did not comply with that section. His failure to answer question No. 26 would be unimportant if his hotel complied with the law, or if he ran a saloon. When, however, that failure is emphasized by the fact that he is running a hotel which does not meet the requirements of the law it becomes significant. He carried on the traffic in liquor in the hotel under false pretenses. He is responsible for omitting to state the crucial facts entitling him to sell liquor in a hotel, and he can not excuse his misconduct by the lack of vigilance, if any existed, of the officer who issued the certificate.

It is to be remembered, also, that this law is primarily a tax measure; that the holder of a certificate is assessed for the privilege granted him. While the certificate is of value its real import is a voucher for the money paid. The specific rights and obligations under the law are derivable from the statements of the applicant and not from the certificate.

The order is affirmed, with costs.

MCLENNAN and WILLIAMS, JJ., concurred; ADAMS, P. J., concurred in result in a memorandum; LAUGHLIN, J., dissented in memorandum.

ADAMS, P. J. (concurring):

Had the appellant answered the 26th question in the affirmative his answer would have been false and the revocation of his tax

certificate would follow as a natural consequence. On the other hand, had his answer been in the negative he would not have been entitled to receive such a certificate. The question, therefore, which presents itself is, whether by omitting to answer the question at all he shall be permitted to secure to himself a privilege which he could not have secured had he made any answer to that inquiry.

It is perfectly obvious that at the time the certificate was applied for the premises in which the appellant carried on his hotel did not, nor do they now, meet the requirements of section 31 of the Liquor Tax Law (Laws of 1896, chap. 112). This was something of which he must necessarily have been aware, and although there is no finding to that effect, the conclusion is irresistible that his omission to answer question 26 was not accidental, but was an intentional evasion, designed to mislead the special deputy commissioner of excise. It was therefore, a fraud upon that official, and however negligent he may have been in not discovering the omission, the appellant should not be permitted to profit by his fraudulent act. For this reason I favor an affirmance of the order appealed from.

LAUGHLIN, J. (dissenting):

The liquor tax certificate in question was voluntarily surrendered and delivered to the Commissioner of Excise prior to the commencement of this proceeding. The sole object of the proceeding is, therefore, to deprive the appellant of the rebate of the tax paid for the unexpired part of the excise year. The only issue presented by the petition, as amended by the order of the court which was made on consent, and the answer, is whether the appellant made a false statement in answering question 26 contained in his application. It was shown and is conceded that no answer to the question was written in the application or otherwise expressly made. It is claimed that the mere presentation of the petition showing an intention to keep a hotel, with this questioned unanswered, constitutes an answer to the question in the affirmative by implication. The same form of application is used by saloon and hotel keepers, but question 26 need not be answered where the applicant only intends to conduct a saloon. I deem the view that such an application constitutes by implication an affirmative answer to question 26 erroneous, and

consider the conclusion therefrom that the applicant made a false statement in his application unwarranted.

The other questions discussed in the prevailing opinion are not, I think, presented by the record.

Order affirmed, with costs.

Fourth Appellate Department, April, 1900. Reported 51 App. Div. 618.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS
CONNOLLY, Appellant.

Fletcher C. Peck, for appellant.

The court erred in charging that the termination of the meal terminated the relation of landlord and guest; such relation does not cease until the guest leaves the house with the intention of not returning. (*Wintermute v. Clarke*, 5 Sand. 242; *Seymour v. Cook*, 53 Barb. 451; *McDonald v. Edgerton*, 5 Barb. 560; 11 Am. & Eng. Ency. of Law, 28.)

The defendant's intent and the good faith of the purchaser should have been left to the jury. (*People v. Dippold*, 30 App. Div. 62; *People v. Flack*, 125 N. Y. 324; *People v. Wiman*, 9 Misc. 441, 148 N. Y. 29; *People v. Lyon*, 27 Hun, 180; *Filkins v. People*, 69 N. Y. 101; *Gardner v. People*, 62 N. Y. 299.)

Elmer E. Charles, district attorney, for the respondent.

Upon the evidence that a witness who had ordered for lunch a sandwich and some beer, which were consumed and paid for before a second order was similarly disposed of, and then a pint of whiskey and a pint of brandy had been brought alone as ordered, the court properly charged that if the lunch had been furnished and the liquor paid for, that terminated the meal and the relation of landlord and guest, and unless that relationship was created again, the subsequent sale of whiskey and brandy was in violation of law.

The burden is on the defendant to show that the sale was made

to a guest with his meal. (*People v. Crotty*, 22 App. Div. 77; *Matter of Lyman*, 28 App. Div. 128; *Matter of Lyman*, 28 Misc. 408; *Matter of Breslin*, 45 Hun, 210; *People v. Dippold*, 30 App. Div. 62.)

Seller acts at his peril, irrespective of his intent. (*McCutcheon v. People*, 69 Ill. 601; *People v. West*, 106 N. Y. 295; *People v. Cipperly*, 101 N. Y. 604.)

Judgment of conviction affirmed and proceedings remitted to the clerk of Wyoming county pursuant to section 547 of the Code of Criminal Procedure.

All concurred.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
May 1, 1900.

In the Matter of the Petition of HENRY H. LYMAN to Revoke the
Liquor Tax Certificate of FRANK J. CAMPBELL.

FITZGERALD, J. I can only find from the evidence taken before the referee and by him reported to the court, that the answer made by respondent in reply to question No. 16 in application for liquor tax certificate was false. The falsehood was material from the fact that, if the truth had been told, the application could not have been granted without the consent of adjoining owners. The motion to revoke and cancel the certificate is granted. Settle order on notice.

Supreme Court, New York Special Term. Reported, N. Y. L. J. May 1, 1900.

In the Matter of the Petition of HENRY H. LYMAN to Revoke the
Liquor Tax Certificate of KORNEL JEHLE.

BISCHOFF, JR. J. I am well content to adopt the conclusion reached by Mr. Justice Beekman in *People ex rel. Bassett v. Warden, &c.*, (17 Misc. Rep. 1) that section 31 of the Liquor Tax Law was in effect on March 23, 1896, as to persons dealing in liquors under licenses granted under earlier acts. The respond-

ent, therefore, when selling liquor on Sunday, March 29, 1896, violated the Liquor Tax Law, which was the law in force, and was necessarily convicted under that law, for none other was violated. The assignee of the certificate who took the assignment as security for a loan is not a necessary party to the proceedings (*Re Lyman v. Fagan*, 26 Misc. R. 300).

Motion granted.

Settle order on notice.

Supreme Court, Schenectady Special Term, May, 1900. Reported.
31 Misc. 569.

Matter of the Application of KATE E. VEEDER for the Revocation and Cancellation of the Liquor Tax Certificate Issued to DEWEY MILLER.

1. Liquor Tax Law—Consents—Distance of 200 feet how measured.

In determining the necessities of consents, to liquor traffic, from the owners of buildings occupied exclusively as dwellings, the statutory two hundred feet is to be measured in a straight line from the nearest entrance to the dwelling, whether rear, side or front, to the nearest public entrance to the building where the traffic is to be carried on.

2. Same—Status of dwelling not changed by letting rooms by the week.

A dwelling-house does not lose its character as such merely because its owner occasionally lets rooms by the week.

APPLICATION for the revocation and cancellation of a liquor tax certificate.

De Remer & Angle (C. S. Nisbet, of counsel), for petitioner.

R. J. Cooper (Charles E. Palmer, Charles Hastings, of counsel), for defendant.

STOVER, J. This application is made under sections 28 and 29 of the Liquor Tax Law, on the ground that the material statements in the application were false. A mass of evidence has been taken, but the simple question at issue is whether the requisite consents of owners of dwelling-houses have been obtained. It has been held in the Matter of Herse, decided March 15, 1900, by

Lambert, J., that the nearest entrance to a building occupied exclusively as a dwelling, specified in the statute, is the nearest entrance, whether rear, side or front, to said dwelling, measured in a straight line from the nearest public entrance to the building in which traffic in liquors is to be carried on, and I think this is a correct interpretation of the statute. The distance, 200 feet, is one arbitrarily fixed, and was intended for the protection of dwelling-houses. A saloon in rear of a dwelling might be as obnoxious as one in front. I see no reason why I should not follow the adjudication already made by Judge Lambert.

As to the consent of owners of dwelling-houses? It appears that the owner of one of the houses was in the habit of letting rooms by the week to persons who might apply for them, and it is claimed by the respondent that this action constituted him a boarding-house keeper, under the law, and that he was carrying on a business within the meaning of the statute. The fact that one or more of his rooms were let for occupancy of persons other than members of his family would not deprive his house of its character as a dwelling-house. It is not a place where the general public would be invited to enter and transact business, but for every intent it would still be a private house, and its occupants entitled to the privacy which surrounds a dwelling-house.

The prayer of the petitioner will be granted, with costs.

Application granted, with costs.

Court of Appeals, Reported. 162 N. Y. 546.

NATHANIEL NILES, Appellant, *v.* MARTIN MATHUSA and the
HINCKEL BREWING COMPANY, Respondents.

1. Liquor tax certificate not a chattel—Assignment thereof need not be filed as a chattel mortgage.

A liquor tax certificate issued under the Liquor Tax Law (Laws of 1896, chap. 112), is personal property, but it is not a chattel within the purview of the Chattel Mortgage Act (1 R. S. [9th ed.] 2013), and a transfer thereof as security for a loan is valid as against a subsequent judgment creditor of the assignor, although not filed as a chattel mortgage.

2. Estoppel.

An assignee of a liquor tax certificate, who allows it to remain in the hands of the assignor, is not thereby estopped from setting up title thereto as against a subsequent judgment creditor of the assignor; and, although such creditor is entitled to reach, through a receiver in supplementary proceedings, the assignor's interest in such certificate, subject to the provisions of the Liquor Tax Law, he stands in no different or better position than if he were a subsequent assignee of the certificate as security for his debt.

Niles v. Mathusa, 20 App. Div. 483, affirmed.

(Argued March 23, 1900; decided May 1, 1900.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered in favor of defendants September 18, 1897, upon the submission of a controversy on an agreed statement of facts under section 1279 of the Code of Civil Procedure.

The facts, so far as material, are stated in the opinion.

George H. Corey and *George E. Morgan*, for appellant.

The liquor tax certificate is property, the assignment of which must be recorded to be good as against a *bona fide* creditor. (*People v. Durante*, 19 App. Div. 292; *Neligh v. Michenor*, 3 Stock. Ch. 542; Story's Eq. Juris. § 1021.) The assignee, by allowing the certificate to remain in the hands of the assignor, and by clothing him with the apparent ownership, is estopped from now setting up title to such certificate. (*McNeil v. T. Nat. Bank*, 46 N. Y. 325; *Moore v. M. Nat. Bank*, 55 N. Y. 41; *Matter of Gillespie*, 15 Fed. Rep. 734; Bispham's Principles of Equity [5th ed.], §§ 168, 169; 1 Am. & Eng. Ency. of Law, 840; *Judson v. Corcoran*, 17 How. [U. S.] 612; *Spain v. Hamilton*, 1 Wall. 625; *Van Buskirk v. H. Ins. Co.*, 14 Conn. 145; *Campbell v. Day*, 16 Vt. 558; 2 Pomeroy on Equity, § 698.)

J. Murray Downs, for respondents.

The liquor tax certificate was assignable. (*People ex rel. v. Lyman*, 156 N. Y. 410.) The certificate is a chose in action. (*Niles v. Mathusa*, 20 App. Div. 483; *Kochler & Son Co. v. Flebbe*, 21 App. Div. 210; *Anchor Brewing Co. v. Burns*, 32 App. Div. 272; *Matter of Jenney*, 19 Misc. Rep. 244.) It was not necessary to file the assignment of the certificate in the county clerk's office. (*Niles v. Mathusa*, 20 App. Div. 483; *Kochler & Son Co. v. Flebbe*,

21 App. Div. 210; *Matter of Jenney*, 19 Misc. Rep. 244; *Thomas v. Schumacher*, 17 App. Div. 441; Code Civ. Pro. § 3343; L. 1896, ch. 908, § 2, subd. 4; L. 1897, ch. 417, § 21, subd. 6; 3 Am. & Eng. Ency. of Law, 167, 235.) The assignment to the defendant Hinckel Brewing Company being prior in point of time, is effectual as against the plaintiff, a creditor by execution, and it was not necessary for the defendant brewing company to give any notice to subsequent assignees or attaching creditors. (*Chambers v. Lancaster*, 160 N. Y. 348; L. 1897, ch. 418, § 115; *Williams v. Ingersoll*, 89 N. Y. 509; *Fortunato v. Patten*, 147 N. Y. 277; *Matter of Hone*, 153 N. Y. 522; *York v. Conde*, 147 N. Y. 486.)

BARTLETT, J.: The Hinckel Brewing Company in June, 1896, loaned to defendant Mathusa money for the purpose of purchasing a certificate under the Liquor Tax Law (Chap. 112, Laws 1896); Mathusa assigned the certificate to the company as security for the loan, the same to remain its property until payment.

In December, 1896, the plaintiff recovered a judgment against Mathusa, and issued execution thereon which was returned unsatisfied.

Proceedings supplementary to the execution were instituted and a receiver duly appointed.

The plaintiff claims that the liquor tax certificate is a chattel, and a transfer thereof as security for a debt is only valid as against creditors when it is filed as a chattel mortgage.

It is also argued that as the assignee allowed the certificate to remain in the hands of the assignor, thus clothing him with apparent ownership, he is estopped from setting up title as against plaintiff.

The question whether the certificate is to be regarded in law as a chattel is now presented to this court for the first time. The Appellate Divisions are not at agreement on this subject. In *People v. Durante* (19 App. Div. 292) the Appellate Division, first department, held the certificate to be personal property within the definition of the statute that "everything except real property, which may be the subject of ownership," is personal property. (Statutory Construction Act, Laws 1892, ch. 677, § 4.)

From this it was argued that everything which may be assigned is capable of being mortgaged, and, consequently, a chattel mortgage of a certificate is valid.

In *Koehler & Son Co. v. Flebbe* (21 App. Div. 210) and *Anchor*

Brewing Co. v. Burns (32 App. Div. 272) the Appellate Division second department, held that the certificate is a chose in action and not a chattel.

The certificate is very brief, its form being set forth in the statute. It is issued by the special deputy commissioner or the county treasurer, and is merely a receipt for the money paid, by the person named, as excise tax under the law on the business of trafficking in liquor to be carried on in a certain place for a definite period.

Beneath the date and signature appear these printed words: "Severe penalties are imposed for neglect or refusal to place and keep this certificate conspicuously in your place of business."

The rights and privileges conferred and obligations imposed by this certificate are to be found in the statute and not on the face of the instrument.

The certificate differs essentially from the licenses issued under former excise laws; it may be surrendered and the unearned portion of the tax is returned; it can be assigned, subject to the limitations of the statute, and if the holder dies it is an asset in the hands of his executor or administrator who may collect the rebate. The certificate is undoubtedly personal property under accepted definitions, but it remains to be considered whether it is in legal contemplation a chattel, and, consequently, within the following provision of the Revised Statutes relating to chattel mortgages: "Every mortgage or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession * * * shall be absolutely void * * * unless the mortgage, or a true copy thereof, shall be filed. * * *" (Laws 1833, ch. 279, § 1; R. S. [9th ed.] p. 2013.)

The Statutory Construction Law (Ch. 677, Laws 1892, § 4) provides: "The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership. The term chattels includes goods and chattels."

The Tax Law (Ch. 908, Laws 1896, § 2, subd. 4) provides: "The terms 'personal estate,' and 'personal property,' as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage," etc.

This section deals with other details not necessary to quote and includes public stocks, stocks in moneyed corporations, etc.

Bouvier's Law Dictionary, title "chattel," states: "Personal chattels are, properly, things movable, which may be carried about by the owners, such as animals, household stuff, money, jewels, corn, garments and everything else that can be put in motion and transferred from one place to another."

The definitions quoted above are exceedingly elementary, but the contention of the appellant renders it necessary to recall them as they are a complete answer to his argument.

The term "personal property" is comprehensive and includes chattels; the term "chattels" refers to things that can be used, handled, transported, as horses, carriages, furniture, machinery, tools and the numberless objects to be seen about us in every-day life, the value of which is in the possession of the thing itself.

The drafter of the Chattel Mortgage Act, when confining its operation to "goods and chattels," had the clear distinction in mind which has always existed between personal property and chattels.

The certificate, the nature of which we are considering, has no attribute of a chattel; the holder of it has in his possession a paper writing which is a receipt for money and a license to traffic in liquors, which may be canceled at his pleasure, assigned, and will pass to his legal representatives if he dies.

In so far as the paper is a receipt, the fact appears on its face; to ascertain the other rights of the holder resort must be had to the statute.

If a thief should steal this certificate it would be waste paper in his hands; if he should make off with a horse and escape detection he would realize its value.

In the one case the thief would be in possession of an unassigned chose in action and in the other of a chattel which could be sold for its full value.

The liquor tax certificate is personal property, but it is not a chattel within the purview of the Chattel Mortgage Act.

The appellant's further point is that as the assignee allowed

the certificate to remain in the hands of the assignor, thus clothing him with apparent ownership, he is estopped from setting up title as against plaintiff.

The appellant is not a *bona fide* purchaser, but a judgment creditor.

There is no proof as to when the cause of action arose that is represented by the judgment, nor is there evidence that the plaintiff parted with anything of value, or changed his situation in any way to his damage, on the faith of Mathusa's apparent ownership of the certificate.

The brewing company received its assignment of the certificate about six months before the plaintiff recovered his judgment. The plaintiff, as a judgment creditor, is entitled to reach, through the receiver in supplementary proceedings, Mathusa's interest in the certificate, subject to the provisions of the Liquor Tax Law and nothing more. He stands in no different or better position than if he were a subsequent assignee of the certificate as security for his debt.

The law is well settled in this State that as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor. (*Fortunato v. Patten*, 147 N. Y. 277, 283; *Fairbanks v. Sargent*, 104 N. Y. 108; *S. C.*, 117 N. Y. 320; *Williams v. Ingersoll*, 89 N. Y. 508; *Muir v. Schenck*, 3 Hill, 228.)

The judgment appealed from should be affirmed, with costs.

GRAY, MARTIN, CULLEN and WERNER, JJ., concur; PARKER, Ch. J., not voting; VANN, J., absent.

Judgment affirmed.

Court of Appeals. Reported. 163 N. Y. 552.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 12,300, Issued to ERIE COUNTY ATHLETIC CLUB, Appellant.

Matter of Lyman, 46 App. Div. 387, affirmed.
(Submitted April 18, 1900; decided May 8, 1900.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 4, 1900, affirming an order of Special Term denying a motion of defendant for the trial of the issues herein by a jury, and appointing a referee to take and report the proofs in relation to the allegations contained in the petition.

The questions certified were as follows: *First*. Has the court jurisdiction to grant any relief on the facts set out in the petition?

Second. Is the Erie County Athletic Club, the appellant, entitled to a trial by jury on the issues raised, as a matter of right?

Moses Shire and Edward L. Jellinek for appellant.

Mead & Stranahan for respondent.

Order affirmed, with costs, on opinion below.

First question certified answered in the affirmative.

Second question certified answered in the negative.

CONCUR: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
June 16, 1900.

HENRY H. LYMAN as State Commissioner of Excise, v. A. RUEHL,
et al.

Mead & Stranahan, for plaintiff.

David Hershburt, for defendant Ruehl.

Boardman, Platt & Soley, for surety company.

GILDERSLEEVE, J.: The action was brought by Henry H. Lyman, as State Commissioner of Excise, against Adolph Ruehl, as principal and the Fidelity & Deposit Company of Maryland, as surety, to recover \$1,600 and costs, under section 18 of the Liquor Tax Law. The defendant Ruehl was a saloonkeeper and was charged in the complaint with unlawfully selling liquor on Sunday. The answer of the defendant corporation admits its suretyship and denies any information sufficient to form a belief as to the other allegations of the complaint, while the answer of the defendant Ruehl sets up the defense of bankruptcy. The defendant corporation did not appear at the trial, but the other defendant proved his defense and as to him the complaint was dismissed. Decision, however, was reserved, at the request of counsel, as to the liability of the other defendant and as to the allowance of costs in favor of the defendant Ruehl. It seems to me that if the principal is not liable the surety is not liable. They were sued together, although they put in separate answers, and the successful defense of the principal inures to the benefit of the surety, even though the surety was not represented at the trial, and even if the surety, were it sued alone, could not have availed itself of that defense. (See *Bank v. Brown*, 75 Hun 259.) As to the question of costs, I fail to see how they are discretionary. Section 3228 of the Code, subdivision 4, taken in connection with section 3229, provides that the successful party is entitled to costs, of course, where the complaint demands judgment for a sum of money only. The complaint herein simply "demands judgment against the defendants for the sum of \$1,600, besides the costs of this action." It therefore follows that the complaint must be dismissed as to the surety also, and that the motion for costs must be granted.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
June 9, 1900.

In the Matter of the Application of MAYNARD N. CLEMENT for an
Injunction Against DOBIE R. HARLEY.

Royal R. Scott, for petitioner.

LEVENTRITT, J.: The testimony taken before the referee satisfies me that there has been a violation of the Liquor Tax Law, and that an injunction should issue pursuant to section 29 thereof.

Settle order on notice.

Supreme Court, New York Special Term, June, 1900. Reported. 66 N. Y.
Supp. 1133.

In the Matter of the Petition of JOHN S. HANSON to Revoke the
Liquor Tax Certificate of ANTHONY HOWARD.

Royal R. Scott, for petitioner.

LEVENTRITT, J. It is quite apparent from the survey that the required number of consents within the prohibited distance has not been secured. Even could the respondent's erroneous claim of measurements be accepted, it would still remain that several of the improperly acknowledged consents necessary to make the requisite two-thirds have been obtained by fraud and misrepresentation and must, therefore, be disregarded. The misstatements were willful and of material facts and compel a revocation of the certificate. (*Kessler v. Cashin*, L. J., June 11, 1900.) The application is granted as of the date of the filing of the petition. (*Lyman v. Monahan*, 28 Misc. 408, 48 App. Div. 275.)

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
June 13, 1900.

In the Matter of the Petition of GEORGE H. MILLER to Revoke the
Liquor Tax Certificate of HERMAN MENAKER.

Royal R. Scott, for petitioner.

LEVENTRITT, J. It is clear that in the absence of the required number of consents the respondent was not entitled to receive or hold the certificate. The fact that his mistake was innocent and that he believed that he had complied with the provisions of the Liquor Tax Law cannot prevent cancellation, although it should relieve from the payment of costs.

Motion granted accordingly.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
June 28, 1900.

In the Matter of the Application of WALTER H. VAN VLECK to
Revoke the Liquor Tax Certificate of JOHN E. COONAN.

Benjamin Patterson, for petitioner.

Frederick E. Grant, for respondent.

BISCHOFF, JR., J. The respondent asserts that no proof of the petitioner's residence and citizenship was given, but the record discloses the proof at the outset of the inquiry. Whatever dispute there may be as to dwellings on Twenty-fifth street not covered by the application for the license, there is no contradiction in the testimony, nor upon the present argument, that two buildings on Twenty-fourth street should be included among the dwellings within the prescribed limit, and, if these buildings be included, there is no doubt that the petitioner's case has been made out. The fact that the license has expired, pending the

determination of the proceeding, is no answer to the application for an order upon the merits. (*Re Lyman v. Monahan*, 28 Misc. R. 408.)

Motion granted, with costs.

Supreme Court, Appellate Term, June, 1900. Reported. 31 Misc. 726.

MARKS L. FRANK, Respondent, *v.* ETTA FORGOTSTON, Impleaded, etc., Appellant.

Bond—Protecting assignee of liquor tax certificate against “any loss by reason of the title”—Non-delivery of certificate not a breach as to surety—Demurrer.

Where a person duly assigns and warrants title to a liquor tax certificate, an assignable instrument, his failure to deliver it to his assignee does not, as to a surety, constitute a breach of an accompanying bond, protecting the assignee against any loss “by reason of the title,” as the delivery of the certificate is not necessary to the vesting of title.

Where the complaint upon such a bond does not allege a breach other than the failure to deliver the certificate, the demurrer of a surety must be sustained.

Frank v. Forgetston, 30 Misc. Rep. 816, reversed.

APPEAL by the defendant, Etta Forgetston, from a judgment of the City Court of the city of New York, overruling a demurrer to the complaint herein.

James C. De La Mare, for appellant.

Philip J. Britt, for respondent.

PER CURIAM. We think that the bond in suit, although inartificially expressed, was plainly intended to protect the plaintiff against any defect in the title to the property which had been assigned to him by the defendant John S. Forgetston. It was delivered simultaneously with an assignment from John S. Forgetston to the plaintiff, in which, for the consideration of the sum of \$850, the former sold and transferred to the plaintiff certain chattels which are specially enumerated, together with

"all right, title and interest in and to the liquor tax certificate now issued by the State excise authorities for the sale of liquor," etc., on the premises mentioned in said assignment. The assignment also contained a covenant on the part of the assignor "to warrant and defend the sale of the said goods and chattels hereby sold unto the said party of the second part, his executors, administrators and assigns against all and every person and persons whomsoever. And the party of the first part hereto for himself and his legal representatives does hereby warrant the title hereby given to the goods, chattels, etc., mentioned in the annexed schedule, and hereby agrees to forever defend the title to the same in behalf of the party of the second part hereto against any and all persons whatsoever." The schedule referred to, as annexed, contains an inventory of all of said goods and chattels, including, "1. Liquor tax certificate, No. 3866, dated May 4, 1897." The condition of the bond in suit is "that if the above-named Marks L. Frank shall lose any sum or sums of money by reason of the title to certain goods and chattels vested in him by a certain delivery thereof and a bill of sale executed simultaneously therewith on the 15th day of September, 1897, by John S. Forgotston, one of the parties to these presents, up to the amount of \$850, or any part thereof, that for such sum of money as shall be lost by said Frank these presents shall be in full force and effect, otherwise to become null and void." The breach of the bond which is alleged in the complaint, is that the plaintiff has not received from the defendant John S. Forgotston, the said liquor tax certificate; but that the defendants have neglected and refused to deliver the same to the plaintiff. But this does not constitute a loss to the plaintiff growing out of any failure of title. The delivery of the certificate was not necessary to the vesting of title thereto in the plaintiff. That was fully accomplished by the written assignment, which in terms transferred whatever property interest there was in the license in question; and the failure of the vendor to actually deliver the certificate itself to the vendee, while doubtless it has occasioned loss to the plaintiff, has not caused a loss resulting from failure of title; and it is to indemnify the plaintiff against a loss of that character alone that the bond in question was given. That a liquor tax certificate is property that may be sold or hypothecated as security for a loan is well settled by authority. *People v. Durante*, 19 App. Div. 292; *Niles v. Mathusa*, 20 id. 483; *People ex rel. Miller v.*

Lyman, 156 N. Y. 407, 409. It is, we think, fairly to be inferred from the facts that the bond was given in furtherance of the covenant of title which the assignment contains and as additional security against any failure of title on the part of John Forgetston to any of the property which he assumed to convey. The plaintiff's remedy, then, is apparently one against his assignor alone, based not upon a failure of title, but upon a failure to deliver one of the articles sold. As the defendant Etta Forgetston was not a party to the sale, but only to the bond upon which this action was brought, she can be made liable to the plaintiff only for a breach of the condition of the bond, and as no such breach seems to have been set up in the complaint, according to the construction which we have given to the said bond, no cause of action is stated against her, and her demurrer on that ground should have been sustained. As, however, it was overlooked in the court below, the judgment there rendered against the defendant Etta Forgetston must be reversed, with costs, but with leave to the plaintiff to amend his complaint within six days after the service upon his attorney of a copy of the judgment of reversal, upon payment of costs.

Present: BEEKMAN, P. J., GIEGERICH and O'GORMAN, JJ.

Judgment reversed, with costs, with leave to plaintiff to amend his complaint within six days after service of a copy of judgment of reversal, upon payment of costs.

Supreme Court, Kings Special Term, June, 1900. Reported. 32 Misc. 108.

Matter of the Application of MICHAEL SEITZ.

Liquor Tax Law—Rebate refused, on surrender of certificate, if any complaint for violation of statute is pending.

Under the Liquor Tax Law (Laws of 1896, chap. 112, § 25), an unexpired liquor tax certificate can not be surrendered and a rebate recovered where any complaint, prosecution or action for a violation of the statute is pending against the holder of the license whether the said violation occurred during the running of the certificate sought to be surrendered or at any time prior.

APPLICATION for a writ of mandamus against the Commissioner of Excise of the State of New York to compel him to pay to the applicant the rebate on a surrendered liquor tax certificate for the time it had yet to run.

John A. Kamping, for application.

P. W. Cullinan, opposed.

GAYNOR, J.: This application is opposed on the ground that the applicant was indicted for an alleged violation of the Liquor Tax Law while holding a liquor tax certificate which expired prior to the one now sought to be surrendered having been issued to him, and has not been acquitted under the said indictment. This seems to be a good objection. The only right to such rebate is under section 25 of the Liquor Tax Law, and it can not be got except within the strict terms thereof. The question is not one of forfeiture. That section permits a person holding a liquor tax certificate to surrender it to the officer who issued it, providing there be not pending against him any "complaint, prosecution or action" for any violation of the Liquor Tax Law. If any such be pending he has no right to offer to surrender it, and such an offer could not be entertained. This disability is not confined by the statute to such a violation during the term of the certificate to be surrendered, but is based on any violation of the statute for which a complaint, prosecution or action is pending. Such surrender can be applied for only upon a verified petition showing that no such complaint, action or prosecution is pending. If such petition can not be made there can be no surrender. And upon such surrender to such officer who issued the certificate, the State Commissioner of Excise, to whom the verified petition and the surrendered certificate have to be transmitted, has to hold the matter in abeyance for 30 days to see if any such complaint, prosecution or action be brought after such surrender, and if any be so brought "such petition shall not be granted until the final determination of such proceedings or action" in favor of the certificate holder. In brief, the construction of section 25 is this: If a complaint, prosecution or action for a violation of the Liquor Tax Law at any time be pending, the certificate holder can not surrender the certificate to the officer who issued it for transmission to the State Commissioner of Excise and if none

be pending, and such surrender and transmission be made, the latter officer has still to hold the matter for thirty days before paying the rebate, and if meanwhile one be brought he must await an acquittal before paying. The object of the statute is that rebates shall not be paid to those who shall be convicted of violating the statute. Whether such violation occurred during the running of the certificate sought to be surrendered, or previously, can make no difference.

The application is denied.

Supreme Court, Fourth Appellate Department, June, 1900. Reported.
52 App. Div. 634.

In the Matter of the Application of EUGENE SULLIVAN for an
Order for a Special Town Meeting in the Town of Volney.

In consequence of the amendment to section 16 of the Liquor Tax Law by chapter 367 of the Laws of 1900, and owing to the fact that the special election directed by the order appealed from has been held, with like result as the alleged irregular biennial election, the questions presented by this appeal are no longer of practical importance. The appeal is, therefore, dismissed, but as respondent did not appear, without costs.

All concurred.

Fourth Appellate Department, June, 1900. Reported. 52 App. Div. 635.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, against
CHARLES WERNER, Appellant.

Judgment of conviction affirmed and proceedings remitted to the clerk of Wyoming County, pursuant to the provisions of section 547 of the Code of Criminal Procedure.

All concurred.

Fourth Appellate Department, June, 1900. Reported. 52 App. Div. 635.

HENRY H. LYMAN, as State Commissioner of Excise, Respondent,
against THOMAS H. CHEEVER and Another, Appellants.

Interlocutory judgment affirmed, with costs, with leave to the defendant to withdraw the demurrer and answer upon payment of the costs of this appeal and of the demurrer.

All concurred.

Third Appellate Department, June, 1900. Reported. 53 App. Div. 32.

HENRY H. LYMAN, as State Commissioner of Excise, Respondent,
v. NICHOLAS SCHERMERHORN, Defendant, Impleaded with
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant.

Liquor tax certificate—Liability of a surety on a bond given by an applicant therefor.

A surety on a bond, given upon an application for a liquor tax certificate, becomes responsible only for the future acts of the certificate holder in the conduct of the business, and does not warrant the truthfulness of the statements contained in the application, or that the applicant has never been convicted of a felony.

Consequently, where the excise authorities contend that a liquor tax certificate is void upon the ground that the holder thereof had previously been convicted of a felony, and was, therefore, prohibited from trafficking in liquor by section 23 of the Liquor Tax Law (Laws of 1896, chap. 112), the surety upon the bond given to obtain the certificate is not liable for the acts of the holder in selling liquor under the certificate, as, if the certificate was a nullity, the bond was a nullity also.

APPEAL by the defendant, the Fidelity and Deposit Company of Maryland, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Ulster on the 9th day of January, 1900, upon the verdict of a jury for \$700, the full penalty of a bond given upon an application for a liquor tax certificate, rendered by direction of the court, and also from an order entered in said clerk's office on the 16th day of January, 1900, denying the said defendant's motion for a new trial.

Frank H. Platt and Francis G. Kimball, for the appellant.

Charles F. Cantine, for the respondent.

KELLOGG, J. The defendant Nicholas Schermerhorn made application for a liquor tax certificate, and, at the same time, presented to the county treasurer the usual bond with the defendant, the Fidelity and Deposit Company of Maryland, as surety. The tax certificate was issued to him, and thereafter he entered upon the business which the certificate authorized, and made, as the proof shows, three sales of liquor. It is not claimed that the sales so made violated any of the provisions of the Liquor Tax Law, provided the tax certificate authorized the defendant Schermerhorn to traffic in liquor. It is claimed by the respondent that the tax certificate afforded no protection to the person to whom it was issued, because the applicant had previously been convicted of a felony. The case presents only a question of law, all the facts being admitted or undisputed.

The Liquor Tax Law provides (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312, § 23), "No person who has been, or who shall be, convicted of a felony" shall traffic in liquor. Section 17 (subd. 5) provides that the application for a liquor tax certificate shall contain a statement made and verified by the applicant "that such applicant has not been convicted of a felony." Section 28 provides, "Said liquor tax certificate may be revoked and canceled if material statements in the application of the holder of such certificate were false." Section 34 provides, "Any * * * person trafficking in liquors, who is prohibited from so doing, * * * shall be guilty of a misdemeanor," and fined and imprisoned. Subdivision 2 of section 34 provides, "Any * * * person who shall make any false statement in the application * * * shall be guilty of a misdemeanor," and punished by fine and imprisonment. Section 42 provides that any person who shall make a false statement upon application for a liquor tax certificate shall, in addition to the other penalties and punishments mentioned, be liable in an action by the Commissioner of Excise for fifty dollars for each offense. So it appears that aside from the bond required to be given, the offense of a false statement by an applicant for a tax certificate has been made highly penal, and punishment in several ways has been provided.

As conditions precedent to the issuing of a tax certificate, a written application in the form prescribed by the Liquor Tax Law, and also a bond in the form prescribed by the same law, must be presented to the county treasurer. The prescribed form of the bond does not bear a construction making it an assurance of the truthfulness of the statements in the application, nor would it be taken as a breach of any of the conditions of the bond if the statements were in fact all false. The bond runs with the future acts of the applicant in the conduct of the business which he is to be authorized to do; it is an assurance that such authorized business will be conducted in the manner prescribed by the Liquor Tax Law and not otherwise; that the privilege of trafficking in liquor will not be abused, and all the requirements of the law will be observed in the conduct of the business. It is a contract with the State touching the *conduct of a business*. It is not an assurance that the applicant was never convicted of a felony. It is not an assurance that he would not enter upon the business of trafficking in liquor. The State has required no bond from the prohibited class, nor has it required a bond from any citizen that he will not traffic in liquor. If the defendant Schermerhorn was already proscribed as having once been convicted of a felony, no contract touching the trafficking in liquor could be made with him. The contract, if made, would be void. It is enough to say that the law itself prohibits such contracts, for it prohibits all dealings with that class touching any privilege in this field of traffic. If the holder of this certificate, or his bondsman, was being prosecuted for failure to conduct the business in the prescribed manner, for instance, for selling liquor on Sunday or to a minor, neither the holder of the certificate nor his bondsman would be permitted to say that the contract was void because the holder had been convicted of a felony. But here the State claims that it granted nothing, no right to do a business, and yet claims that the bond given to assure the business is good. I do not think it is. I think the bond is as near waste paper as the certificate. In no event could the certificate be good, or be made good, not at any rate until the sovereign power which made it void should see fit to make it otherwise by the enactment of a new law. The defendant Schermerhorn sold liquor without the right to sell, without a license, without any privilege granted by the State, and should be treated as other persons are treated who sell without a license or the right to sell. He held no tax

certificate; he was not a person who could give a lawful bond to traffic in liquor. Such a bond as the law contemplates shall only be given by those who can do a business of that nature. It seems to me that it is only by construing the bond to be an assurance to the State that all the statements in the application are true that the bond can be treated as authorized by the law or valid for any purpose; but obviously the bond is not susceptible of that construction. The learned counsel for the respondent does not claim for it such a construction, but places the breach of the conditions of the bond wholly in the fact that Schermerhorn sold liquor, not having a valid tax certificate. There has been no violation or abuse of any granted privilege, and hence no breach of any conditions of the bond. That there has been a sale made in violation of the provisions of the Liquor Tax Law is true, but not by any one who held a tax certificate—so the plaintiff claims—and it must follow that the violation was by one who could not give a valid bond, a bond authorized by the Liquor Tax Law. Would it be different if the application had been refused and a sale had been made without any pretense to a tax certificate? I think not. I see no difference in the two cases so far as the principle involved in this action is concerned.

The judgment should be reversed, with costs.

All concurred, except EDWARDS, J., not sitting.

Judgment reversed on the law and new trial granted, with costs to abide the event.

Court of Appeals. Reported, 163 N. Y. 205.

In the Matter of the Petition of LEVI L. KESSLER, Respondent, to Revoke and Cancel Liquor Tax Certificate No. 5,202, Issued to PATRICK CASHIN, Appellant.

Liquor Tax Law—A place having an absolute right to a certificate does not lose it by a necessary temporary suspension of business.

Statements contained in an application for a liquor tax certificate made in April, 1899, and while the premises were being repaired after a fire which had partially destroyed them in February, 1899, to the effect that traffic in liquors had been lawfully carried on upon the premises on the 23d day of March, 1896, and continuously since that date, and that the

applicant can lawfully carry on such traffic there, do not constitute a willful misstatement of a material matter of fact, within any fair construction of the statute, sufficient in law to warrant the court in revoking the certificate on the ground that the holder thereof had made false statements in the application, in that the occupation has not been actually continuous, since the absolute right to a certificate, which attaches under the Liquor Tax Law to a place occupied for such traffic at the passage of the statute, and at all times thereafter, is not lost by a temporary suspension of business, caused by fire, accident, or stress of circumstances.

Matter of Kessler, 44 App. Div. 635, reversed.

(Argued April 16, 1900; decided June 5, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 2, 1899, affirming an order of Special Term Revoking and canceling liquor tax certificate No. 5,202.

The nature of the proceeding and the facts, so far as material, are stated in the opinion.

Louis J. Somerville for appellant. The fact that the licensed premises were closed while repairs were being made and while the liquor tax certificate was in force without any intention of abandoning the traffic in liquor does not make the premises a new place, requiring the consents of adjoining owners. (L. 1896, ch. 112; L. 1897, ch. 312.) The act of 1896 gives the privilege of trafficking to the place, not to the occupant as did the act of 1892, and an assignee of the certificate may continue the business. (*People ex rel. v. Lammerts*, 18 Misc. Rep. 344; *Matter of Zinzow*, 18 Misc. Rep. 653; *People ex rel. v. Murray*, 148 N. Y. 171.)

Samuel Strasbourger for respondent. It was clearly intended by the Legislature to restrict the traffic in liquors within two hundred feet of a building or buildings occupied exclusively for a dwelling. (*People ex rel. v. Murray*, 148 N. Y. 171.) The exception in favor of places licensed at the time of the passage of the act is lost by subsequent abandonment. (*Wynehamer v. People*, 13 N. Y. 378; *People ex rel. v. Hamilton*, 25 App. Div. 428; *Matter of Lyman v. Fuhrman*, 34 App. Div. 389; *Matter of Lyman v. Korndorfer*, 29 App. Div. 390; *People ex rel. v. Lammerts*, 18 Misc. Rep. 343; 14 App. Div. 628; *Matter of Ritchie v. Samuely*, 18 Misc. Rep. 341; *Matter of Bridge*, 25 Misc. Rep. 213; 36 App. Div. 533.)

O'BRIEN, J. This proceeding is founded upon the petition by a citizen to the court, praying for an order revoking and canceling a liquor tax certificate issued by the commissioner of excise to one Patrick Cashin upon his written application, verified April 18, 1899. The beginning of the term for which the certificate was desired by the applicant was stated by him in the application to be May first, 1899. It is then alleged in the petition that certain statements made in the application by the applicant were false, and this is the ground upon which the certificate was revoked. The statements in the application alleged to have been false were, in substance as follows: 1. That the traffic in liquors had been lawfully carried on upon the premises on and since March 23, 1896, and that since that date the premises had been occupied continuously for such traffic. 2. That the applicant might lawfully carry on such traffic in liquors on the premises.

The false statements in an application for a certificate which will justify its revocation under the statute must relate to some material matter of fact, and it must be shown that such fact was wilfully misstated by the applicant. If the statement relates to some matter of law, as to which the applicant is ignorant or misinformed, that will not be sufficient to warrant the court in canceling a certificate. It appears in this case that the place where the business was to be conducted was in a residential district where the consent of the residents within two hundred feet of the place is required in order to permit the traffic, unless the premises had been used for that purpose on the 23d of March, 1896, when the present law went into effect and continuously since that day, for the same purpose. It appears from the record that the premises in question were actually used for the liquor traffic on the day mentioned and continuously thereafter until the 22d day of April, 1898, the then occupant procured a new license, which expired on May 1st, 1899. This license was transferred to Cashin on the 20th of April, 1899. It appears that, at this date, the business was temporarily suspended, for the reason that the building, or a portion of it, had been destroyed by fire on the 19th of February previous, and it was not repaired or rebuilt, so as to permit the conduct of the business therein until the 19th of May following. Unless this temporary suspension of the traffic was sufficient to deprive the place of the right to a license reserved in the general law to places where the traffic was being conducted at the date of its passage, the statements of

the petition were not false within any fair construction of the statute. The suspension was due entirely to the fact that the place had been wholly or partially destroyed, since there was no intention to abandon the business, but, on the contrary, to resume it as soon as the building was in a proper condition for that purpose, and it was actually resumed by Cashin under the certificate in question as soon as the place was put in a suitable condition for the business.

The provision of the statute which secures the right to a license for a place where the business is conducted at the time of the passage of the law, does not require that the traffic should be continuous under any and all circumstances. The plain purpose of the law was, that when the business in such places has been once abandoned, it should not be resumed except with the consent of the residents, as pointed out in the statute. A temporary suspension of the traffic, resulting from an accident such as the destruction of the building by fire, or the like, will not operate to affect the right attached to the premises under the law. A suspension of the traffic on Sundays is enjoined by the statute itself, and so in regard to the day of a general election, and possibly some other days, but where a party is in possession of premises to which the privilege conferred by the statute has attached and he is compelled to suspend business temporarily, by reason of an accidental fire, and then resumes in good faith when the necessary repairs required by the fire have been made, it can properly be said that the traffic has been continuously conducted in the place since the passage of the law. In order to deprive the place of the privilege conferred by the statute it must appear that there was a real and substantial abandonment of the business by the occupant; and when that is shown it will terminate the privilege, even though the suspension should be for but a brief period. But where the occupant is compelled to suspend for a brief period by stress of circumstances, or from an accident, such as appears in this case, the right will not be lost, providing the business is resumed at the first reasonable opportunity. We think that the facts upon which this application was based, and which appear in the record, were not sufficient in law to warrant the court in revoking the certificate on the ground that the person holding it made false statements in his application.

The order appealed from should, therefore, be reversed; and,

since there is no dispute with respect to the facts, the proceedings should be dismissed, with costs.

PARKER, Ch. J., BARTLETT, HAIGHT and MARTIN, JJ., concur; VANN, J., absent; LANDON, J., dissenting.

Order reversed, etc.

Court of Appeals. Reported. 163 N. Y. 536.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 11,843, Issued to CHARLES G. SPEIDEL, Appellant.

1. Liquor Tax Law—Failure to answer question in application for certificate not a false answer.

Where the applicant for a certificate under the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), has in his application affirmatively answered a question as to whether he intended to carry on a *bona fide* hotel on the premises, but does not answer at all the next question as to whether such hotel meets the requirements of section 31 of the law, his failure to answer such question can not be regarded as an affirmative answer or equivalent to it, so as to support a charge that a material statement in the application was false, and a cancellation of the certificate upon that ground can not be sustained in a proceeding instituted after he has voluntarily surrendered the certificate.

2. Forfeiture of rebate under section 28, sub. 2—The phrase “any other reason” should be defined by statute.

Where the forfeiture of the rebate allowed after the voluntary surrender by the holder of a certificate under the Liquor Tax Law, must rest upon “any other reason” (§ 28, subd. 2) than the grounds specifically stated in the statute, it should appear in the statute itself, or in some other statute, what is meant by such phrase, and should not be left to the accuser to devise it or for the court to spell it out in penal cases, from reasons of public policy.

3. Specifications in support of unsustained charge of violation of the law fall with the charge.

When, in a proceeding taken after the voluntary surrender of a liquor tax certificate, its revocation is sought for the sole purpose of forfeiting the rebate allowed for the unexpired term upon a charge, which is not sustained, that the holder had made a material false statement in his application therefor, the specifications of its alleged falsity fall with the charge and can not be used for the purpose of spelling out some reason,

permissible to be implied by the phrase "any other reason" used in the statute, which will sustain a conviction of not being entitled to hold the certificate.

Matter of Lyman, 51 App. Div. 52, reversed.

(Argued June 7, 1900; decided June 22, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 10, 1900, affirming an order of Special Term revoking and canceling a liquor tax certificate.

This was a proceeding instituted October 22, 1899, under subdivision 2, section 28 of the Liquor Tax Law (L. 1896, ch. 112, as amd. by L. 1897, ch. 312), to revoke and cancel a liquor tax certificate issued to the defendant May 18, 1899, after he had on October 2, 1899, surrendered the certificate and demanded the rebate for the unexpired term.

In his application therefor he affirmatively answered a question numbered 25, "Does the applicant intend to carry on a *bona fide* hotel on such premises?" He did not answer question numbered 26, "If so, do said premises meet the requirements of section thirty-one of said law as to hotels, and do they comply with all laws, ordinances, rules and regulations of the State and locality where situated, pertaining to the building, fire and health departments, applicable to hotel-keepers."

The petitioner alleged that the defendant from the date of said certificate had been engaged in the traffic in liquors at the above-named premises, and "is now engaged in such traffic"; that the statement "contained in said statement filed by said defendant with the special deputy commissioner of excise as aforesaid, in answer to question No. 26 in said statement contained, was and is a material statement, and was and is false; that the said premises did not and do not meet the requirements of section 31 of the Liquor Tax Law as to hotels, and did not and do not comply with all laws, ordinances, rules and regulations of the State and locality pertaining to the building, fire and health departments applicable to hotels and hotel-keepers. And more particularly the said premises No. 395 Ellicott street in the city of Buffalo did at the time of the filing of said statement by the defendant as aforesaid, fail to comply with section 31 of the Liquor Tax Law in that there are not and were not ten bedrooms above the basement, exclusive of those occupied by the family and

servants of the occupants, properly furnished to accommodate lodgers, and each having at least eighty square feet of floor area, with independent access to each room by a door opening into a hallway. Four of the bedrooms in said premises have no entrance to the hallway. Four of them contain less than eighty square feet of floor area, and six of them are unfurnished, there being but ten in all. Three of them are occupied by a family who use one of the bedrooms as a dining-room. And that for that reason the said Speidel was not entitled to receive, and is not entitled to hold, said certificate."

Further facts are stated in the opinion.

Moses Shire for appellant. No false statement was made by Speidei, the appellant herein, in his application, and the court erred in revoking the certificate. (L. 1896, ch. 112, § 25.)

N. N. Stranahan for respondent. The appellant was not entitled to receive, and after receiving was not entitled to hold, the liquor tax certificate in question, and the same was properly revoked in this proceeding. (L. 1896, ch. 112, § 25; *Matter of Barnard*, 48 App. Div. 423.) The allegation of the petition that the answer to question No. 26 contained in the statement for the certificate was false, is not borne out by the proof, for the question was, in fact, not answered at all by applicant; but by reason of his failure to answer he was not entitled to receive, and was not entitled to hold, the certificate. (*Matter of Lyman*, 28 Misc. Rep. 278; *Freeman v. Cooke*, 6 Dowl. & L. 187; *Pickard v. Sears*, 6 Ad. & El. 469; *Gregg v. Wells*, 10 Ad. & El. 90; *Marvin v. U. L. Ins. Co.*, 85 N. Y. 278.)

LANDON, J. It is not disputed that the application made by the appellant for a hotel-keeper's license or certificate was defective in that it contained no answer to question No. 26. The appellant voluntarily surrendered the certificate before this proceeding was commenced. The first question presented by the appeal is whether the defendant's failure to answer question No. 26 in his application was a false answer. The practical question with the defendant is whether he is entitled to the rebate of the tax paid by him for the unexpired part of the license year. The petition for the cancellation of the certificate alleged in its fourth paragraph as grounds therefor that a material statement in the application for the certificate was false, namely, the answer to

question No. 26 therein. The question was not answered at all, and the argument is that the failure to answer was intended as an affirmative answer, or was equivalent to it. Plainly, no answer is not an affirmative answer; rather it suggests that an affirmative answer could not be made. The evidence shows that an affirmative answer would have been false. We cannot suppose that, if the officer whose duty it was to examine the application had carefully performed that duty, he would have issued the certificate. We may rather suppose that the officer negligently assumed an affirmative answer. The evidence does not support the finding of a false answer, and in that respect does not sustain the order appealed from. The question remains whether it can be sustained upon any other ground. Other grounds were set forth in the 5th, 6th and 7th paragraphs of the petition for cancellation. The matter came before the Special Term upon the defendant's demurrer to the petition and other objections; these were overruled, the proceeding was referred to a referee to take and report the evidence, and it was further "Ordered, the petitioner consenting thereto, that the allegations contained in the petition, being the allegations contained in paragraphs Nos. 5th, 6th and 7th, other than those charging false statements made in the application for the certificate in question, be and the same are hereby stricken out."

The respondent contends that, after striking out all statements in said paragraphs other than those charging false statements made in the application for the certificate, enough remain to present the issue, whether, apart from the alleged false statement the appellant was entitled to hold such certificate. As at the time this proceeding was commenced the appellant did not hold the certificate, but had prior thereto voluntarily surrendered it, the issue as to his right to hold it is academic so far as it operated as a license to defendant to continue the sale of liquor, and is practical only so far as it involves the defendant's right to receive the rebate of the money for the unexpired part of the license year. Section 25 of the Liquor Tax Law provides that, if within thirty days from the receipt of the certificate for cancellation, proceedings shall be instituted for its revocation and they be determined against the holder, all rebate thereon shall be forfeited. The question, therefore, is not whether his license could be canceled if he still held it, but whether it can be canceled for the sole purpose of forfeiting the rebate. The argument that as

he was not entitled to receive the certificate, he was not entitled to hold it, may be effective to deprive him of it as a license, and not effective to forfeit his right to the rebate. In the former case the statute should be construed so as to accord to fraud no favor; in the latter case it should be so construed as not, by a hostile construction of doubtful phrases, to visit a penalty or forfeiture upon a former certificate holder. The statute (Sec. 28, subd. 2) states three grounds of cancellation: 1st, material false statements in the application for the certificate; 2nd, violation of any provision of this law, conviction for which would cause a forfeiture of such certificate; 3d, or for any other reason that he was not entitled to hold such certificate. It will be seen that the statute so specifies the first and second grounds that the certificate holder can understand what they are, but when he comes to the third provision, he finds that in place of a specific ground so stated that he can understand it, "any other reason" is substituted. What is "any other reason?" In the absence of statutory specification, is the certificate holder remitted to conjecture, and must he conjecture aright under penalty of forfeiture of all rebate after he has voluntarily surrendered his certificate for cancellation? Forfeitures are odious in law. Where the forfeiture, after the voluntary surrender of the certificate, rests upon "any other reason" than the grounds specifically stated in the statute, we think it should appear in the statute itself, or in some other statute, what is meant by the phrase "any other reason." It should not be left to the accuser to devise it, or for the court to spell it out in penal cases from reasons of public policy. But if it could be thus devised, such reason should be clearly stated in the charge against the defendant. Here the charge is that the defendant's answer to question No. 26 was false, and then follow specifications of such alleged falsity, closing with this conclusion of law: "And for that reason" (namely, the false statement as thus shown by the specifications) "the said Speidel was not entitled to receive and is not entitled to hold such certificate." Thus the respondent infers that, although the charge of a false statement cannot be sustained, the specifications in support of the charge do not fall with the charge itself, but may be used to imply and define some reason permissible to be implied by the phrase "any other reason," and thereupon the defendant may be convicted of not being entitled to hold the certificate.

We cannot concur in this view when the revocation of the certificate is made the instrument of forfeiture in proceedings taken after the voluntary surrender of the certificate. We, therefore, hold that when the charge of making a false statement failed, no other charge remained upon which the defendant's certificate could be revoked or canceled.

The order should be reversed and proceedings dismissed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT and CULLEN, JJ., concur, and VANN, J., concurs in result.

Order reversed, etc. _____

Court of Appeals. Reported. 163 N. Y. 602.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES L. BRIGGS, Respondent, v. HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, et al., Appellants.

People ex rel. Briggs v. Lyman, 48 App. Div. 484, affirmed.
(Argued June 6, 1900; decided June 22, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered March 17, 1900, affirming an order of the Westchester County Court directing the county treasurer of that county to issue a liquor tax certificate to the relator.

N. N. Stranahan and *P. W. Cullinan* for appellants.

Alfred E. Smith for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, VANN, LANDON and CULLEN, JJ.

Supreme Court, Dutchess Special Term. Reported. N. Y. L. J. July 24, 1900.

In the Matter of the Petition of NORMAN PLASS to Revoke the
Liquor Tax Certificate of MICHAEL SHELLY.

MADDOX, J. S. C. The question presented on the preliminary motion to dismiss must await the taking of proof as to the facts alleged in the petition, since the transferee, by her denial of knowledge or information sufficient to form a belief as to such alleged violations has put the petitioner to his proof thereof, and again she affirmatively alleges that if committed, such violations were so committed without her knowledge or consent.

If she took the certificate with knowledge of the taint, it may possibly have some bearing upon her right to continue a traffic which her transferer had lost the right to by reason of his acts and omissions. The determination of that question had better be made with all the facts and proofs before the court, and hence the motion is denied.

Let a reference be had to take the testimony.

Let order be entered referring the matter to Frederick T. Lyke to take proofs and report the evidence to the court.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
July 30, 1900.

PEOPLE &C. v. CORBIN S. STEWART.

BISCHOFF, JR., J. The policy of the law is to favor a trial by jury, where substantial rights of the defendant depend upon the determination of an issue of fact, and in this case, nominally involving the charge of a misdemeanor, conviction would entail the loss of a considerable sum paid by the defendant for his liquor tax certificate, and would operate to deprive him of his business for five years. Judicial authority is not wanting in support of the view that in a case of this character the defendant should be held entitled, as of right, to an order directing the prosecution of the charge by indictment (*People v. McMahon*, opinion of ANDREWS,

J., handed up on the argument), and, at least, the case appeals strongly to judicial discretion, in the absence of some valid reason for requiring the trial to be had before the Court of Special Sessions. The reason heretofore recognized as operating against a motion of this kind has been that the calendars of the Court of General Sessions were congested, and that to grant the motion would be to give the defendant the benefit of considerable delay, while under bail and still prosecuting his business as a liquor seller, and, at the same time, further to delay the trial of charges necessarily triable by jury. In view, however, of the fact that there is now no delay in the trial of cases where the defendant is under indictment, and that, owing to the commendable diligence of the district attorney of this county, no accumulation of indictments exists, there appears to be no reason for the denial of the present application.

Motion granted.

Supreme Court, Chautauqua Special Term, July, 1900. Reported.
32 Misc. 123.

THE PEOPLE ex rel. JOHN C. BARTH, Relator, v. THE BOARD OF TOWN CANVASSERS OF THE TOWN OF BUSTI, THE BOARD OF INSPECTORS OF ELECTION DISTRICT No. 1, and THE BOARD OF INSPECTORS OF ELECTION DISTRICT No. 2 IN SAID TOWN, Respondents.

1. Liquor Tax Law—Invalid election as to local option—Not a matter which a citizen can attack.

A mere stockholder in, and the manager of, a hotel corporation, selling liquor to its guests, has no status to question the validity of a town election, held in the town where the hotel is situated and deciding against local option, where the corporation itself is not a party to the proceeding, as such a matter is not within the rule of law which authorizes a proceeding to be prosecuted by any citizen having an interest, as one of the public, in the performance, by a public officer, of a public duty which ought to be performed in the interest of the public.

2. Same—Remedy by mandamus to canvassers and inspectors.

Semble, that where a person has sufficient standing to attack an invalid town election authorizing local option, he is entitled to a mandamus compelling the canvassers and inspectors to reconvene and reject the ballots cast upon that question. The remedy of a special election provided in

such case by the Liquor Tax Law is not adequate, as it depends upon the co-operation, by petition, of ten per cent. in number of the electors of the town according to the vote cast at the next preceding general election, and also upon an order of the Supreme or County Court.

3. Same—Defects in procedure.

Seemle, that an election as to local option is void where there was a failure to comply with such provisions of the Election Law and of the Town Law as are applicable thereto, and where the petition itself was insufficient under the Liquor Tax Law.

APPLICATION by the relator for a writ of peremptory mandamus requiring the above-named boards of inspectors and boards of town canvassers to reconvene and reject all votes cast in said election districts upon the subject of local option at the election of November 7, 1899.

Wentworth & Wentworth and Norman M. Allen, for motion.

Frank Stevens, opposed.

WHITE, J. The relator, John C. Barth, is the owner of 125 out of the whole 150 shares of the capital stock of the Lakewood Hotel & Land Company, a domestic corporation that owns two hotels in the said town of Busti; these hotels entertain from 300 to 400 guests during the summer season, many of whom are accustomed to the use of wines and liquors, and who would not patronize the hotels if they were not licensed.

The biennial town meeting of the town of Busti was held November 7, 1899, at the same time as the general election in that year. There are two election districts in said town, and at said town meeting the four excise propositions, or questions, provided for by section 16 of the Liquor Tax Law were voted upon by the electors of said town at said town meeting.

The ballot furnished to and used by such electors in voting upon such questions was in form an official ballot under the Election Law of the State, containing upon its face not only the four excise, or local option, questions, but the four questions upon the then proposed four constitutional amendment questions submitted to the voters of the State at said general election. The ballot was furnished by the clerk of the county. No other ballot was used by the electors of the town in voting upon the local option questions.

The vote upon the question (four) whether hotels in said town should be licensed, resulted in favor thereof, 113, and against the proposition, 228.

A few days prior to October 18, 1899, the town clerk of Busti, received three several petitions signed, the first, by twenty-two individuals representing themselves to be duly qualified voters of said town, the second, by sixteen, and the third by seventeen individuals representing themselves to be duly qualified voters of said town, asking that said clerk cause to be procured ballots for the town meeting to be held in said town November 7, 1899, for the purpose of submitting to the voters of said town, according to articles 1, 2, 3, and 4 of section 16 of chapter 112 of the Laws of 1896, pertaining to the liquor question.

The signing of the first of said petitions was acknowledged by the persons named in and who subscribed it, before A. P. Simons, a notary public, on the 25th, 27th, and 30th days of September, 1899.

At the foot of the second of said petitions, which is dated September twenty-sixth and twenty-seventh, is the following clause:

"We, the above-named legal voters of the town of Busti, did, on the above-named dates, subscribe our names to the above petition for the purpose set forth therein.

"Sworn to before me this 27th day of September, 1899.

"J. P. ALEXANDER, J. P."

A certificate of the acknowledgment of the third of said petitions in due form by the persons signing the same is made by H. N. Brown, a justice of the peace in said town of Busti.

On the 18th day of October, 1899, the clerk of Busti filed said petitions with, and in the office of the clerk of Chautauqua county; no copies thereof thereafter remained with, or in the office of the clerk of the town.

No notice of any kind was given or posted by the town clerk that such local option questions would be voted upon at the election of November 7, 1899. No separate ballot-boxes were provided or used for the reception of the local option ballots. The Lakewood Hotel & Land Company had a license for its said hotels which expired April 30, 1900. Such license was in the name of Morris Partridge, as the manager of said hotels. It was stated by the counsel for the respondent upon the argument, and not controverted by the counsel for the relator, that the relator keeps

and operates said hotels as the agent or manager of the corporation, and such seems to be a fair inference from Barth's own statement of the facts. The relator's claim and statement in the moving papers is that he, as an individual, is entitled to such license, and that the company has authorized him to make this application.

The existence and rights of a township are recognized, and as yet remain zealously guarded, by law. In matters purely local the will of its electors, when lawfully expressed, is supreme. In giving expression thereto, of course, all essential requirements of the law must be observed and complied with.

The first question raised upon the argument of this motion is whether or not a clear legal right possessed by the relator was infringed or prejudiced by the election in Busti, and the result thereof as declared, assuming such election to have been illegal.

This application for a mandamus is made by John C. Barth, as an individual. The hotel corporation is not in any way a party to the proceeding. The statement that the hotel company has authorized him to make it in no way affects his status in the proceeding. No facts are stated from which it can be inferred that, as an individual, he would be entitled to a license for the hotels. Upon the argument it was stated by counsel for the respondents, and not controverted by counsel for the relator, that, in fact, he is keeping and operating the hotels as agent for the corporation, and not otherwise, and such is the only fair inference from the moving papers. Assuming then that, but for the adverse vote on the local option questions at the election of 1899, the hotel company would be entitled to a license, and that its right in that regard is infringed and prejudiced by the said vote and its result as declared, it does not follow that because the relator is a stockholder in the company, he, as an individual, has been injured in such a way as to justify the court in granting the writ asked for. The rights of a corporation in such a case as this to have a writ of mandamus issue, if it exists, cannot be vindicated by a stockholder acting in his own name as an individual, and without making the corporation a party to the proceeding.

The case at bar is not within the rule of law which authorizes the proceeding to be prosecuted by any citizen having an interest, as one of the public, in the performance of a duty by a public

officer, which act is public in its nature and ought to be compelled in the interest of the public generally.

It seems to be clear, therefore, that no clear legal right of the relator has been violated or affected by the adverse vote in question, even though it were illegal.

The respondents contend that mandamus is not the proper remedy, even though the vote in question of November 7, 1899, was illegal and the relator shows himself entitled to relief from the result as declared.

The claim in that behalf being that another adequate and effectual remedy is given by the Liquor Tax Law itself by the provision therein that if for any reason the four local option questions shall not have been properly submitted at a town meeting, such questions shall thereafter be submitted to the voters at a special town meeting to be called upon a petition signed and acknowledged by at least ten per centum in number of the electors of the town according to the vote cast at the next preceding general election, followed by an order that such special town meeting be held, made by the Supreme or County Court, or a judge or justice thereof; and the case of *People ex rel. Caffrey v. Mosso*, 30 Misc. Rep. 164; 63 N. Y. Supp. 585, is cited as an authority to that effect.

It hardly seems to me that the provision of the Liquor Tax Law above referred to can properly be termed a "remedy" in the sense in which the word is used in its application to the writ of mandamus, when it is said that mandamus will not issue where another remedy exists. Such other remedy must be one available to the injured party without reference to his ability to get his neighbors to join in a petition for its redress; it must be a plain, speedy, adequate and specific remedy in the ordinary course of the law. Assuming that the relator has a clear legal right which was violated by the votes and the declared result in question, and that he has a standing in court to prosecute this proceeding, it would seem ridiculous to say that the enforcing of the right must be made to depend upon whether he could get enough of his neighbors to join in a petition and in an application to a judge or court for the special election provided for by the Liquor Tax Law. As a remedy to right a wrong such a proceeding would not answer the purpose of the law. If the facts justified the relator in invoking any remedy in this proceeding, mandamus would be proper. Section 114 of the Election Law, which provides, among

other things, that mandamus may issue within twenty days after the result of the election is declared, etc., commanding a recount and the exclusion of certain ballots, and that boards of inspectors and canvassers shall continue in office for the purpose of such proceedings, seems to be applicable solely to proceedings by defeated candidates for office, and therefore, not applicable to the proceedings at bar.

The personnel of the boards of inspectors and canvassers, who are the respondents in this proceeding, is not the same as of those boards which counted, certified to, canvassed the vote, and declared the result upon the local option questions involved in this proceeding. The functions of those boards, as they were constituted at the time of the election in Busti in 1899, ceased upon the election and qualification of the individuals now composing said boards, and the old boards not having been continued in office for the purpose of such an application as this, by any statutory provision, are *functus officio*, and cannot now be called upon to perform a duty which devolved upon them while they were in existence. Nor can the new board be called upon to perform duties which were never imposed upon it by law.

It appears that a large majority of the qualified electors of Busti, who voted at the election of 1899, and the presumption is that all of them voted, are opposed to the granting of licenses in that town; that no effort was made to resubmit the local option question pursuant to the provision of the Liquor Tax Law; that in consequence of an amendment to it passed April 13, 1900, it would now be impossible for the said town to effectually prevent the granting of licenses therein prior to May 1, 1901, by any action that the electors, or any one of them, was ignorant of the fact that such questions were to be, and were being voted upon at the election. Under the circumstances to nullify the result, if the court has the power to do so, would be inequitable.

Realizing that a court of review may differ from the conclusions to be drawn from what has already been said, and may be said, concerning one or more of the questions thus far discussed and other propositions involved in this application, it is thought best to consider briefly the legality of the results of the election of 1899, touching local option in Busti.

As to the local option questions submitted to and voted upon by the electors of Busti in 1899, it was necessary by the terms of the Town Law that the town officers or other persons entitled

to demand a vote thereon should have filed with their town clerk a written application plainly stating the questions they desired to have voted upon and requesting a vote thereon to be held November 7, 1899, at least twenty days before that day. The town clerk should have given at least ten days' notice, posted conspicuously in at least four of the most public places in the town, of those proposed questions, and that a vote would be taken upon them at that town meeting. He should have prepared a ballot-box properly labelled, briefly indicating the questions to be voted upon, in which all ballots voted upon those questions should have been deposited. He should have prepared and have had at that town meeting a sufficient number of ballots, both for and against those questions, for the use of the electors. The State Election Law made it the duty of the county clerk, instead of the town clerk, to furnish the ballots for the local option questions; and the Liquor Tax Law so modified or supplemented the Town Law as to make it incumbent upon the town clerk of Busti to perform the duties above mentioned, only in case the electors of the town to the number of ten per centum of the votes cast at the next preceding general election had, by a written petition signed and acknowledged by such electors before a notary public or other person authorized to take acknowledgments or administer oaths, and such petition was filed with him twenty days before November 7, 1899, requesting such submission of said local option questions. It can not be justly claimed that such a petition as the Liquor Tax Law provides for was signed, acknowledged or filed with the town clerk. A petition was signed by fifty-five individuals, who say in their petition that they are electors of said town, seventeen of whom acknowledged before a justice of the peace that they executed the petition. As to the other thirty-eight, there is nothing that can properly be termed an acknowledgment such as is required to deeds of conveyance to entitle them to be recorded, as required by law. There is no evidence that fifty-five is ten per centum of the number of votes cast in the town at the next preceding general election; the petition was filed with the town clerk about October 18, 1899, and removed from his own office to that of the county clerk about the same date. The town clerk gave no notice of any kind concerning the submission of the local option questions; he prepared no ballot nor any separate box for the reception of those ballots, nor was

there any such separate ballot or box provided by any one. The local option propositions as submitted and voted upon were furnished by the county clerk on a ballot official under the general Election Law in form, which had upon it the four proposed constitutional amendments submitted to the people of the State at said election. There was an utter and almost total failure to comply with the law in submitting those local option questions, from start to finish.

It is claimed by counsel for the State Excise Department, who by courtesy took part in the argument on this motion, that the provisions of the statute thus ignored and violated are directory only and not mandatory; that an apparently full and fair vote having been had the result is conclusive as to its legality.

I am of the opinion that at least the provisions of the statute requiring the initial step to be taken to secure the submission of the questions to the electors of the town according to the votes cast at the next preceding general election is one of substance and mandatory, and the petition in this case not having been in compliance with the statute, all proceedings based upon it would be held irregular and void, if the question had been properly raised in due time.

The motion for a writ of mandamus should be denied, with ten dollars costs to the respondents.

Motion denied, with ten dollars costs to respondents.

Supreme Court, Chautauqua Special Term, July, 1900. Reported.
32 Misc. 131.

THE PEOPLE ex rel. OSCAR C. WOOD, Relator, v. THE BOARD OF
TOWN CANVASSERS, ETC., OF THE TOWN OF RANDOLPH.
Respondents.

**Liquor Tax Law—Local option—Errors of biennial town meeting cured by
action of special town meeting—Mandamus.**

Where a special town meeting has duly and regularly passed upon the question of local option, errors committed in the submission of those questions to a prior biennial town meeting may be deemed to have been rectified, and, therefore, the court will not compel the board of canvassers to reconvene and reject the local option ballots which were cast at the biennial town meeting.

THIS is an application for a writ of peremptory mandamus requiring the respondents to reconvene and reject all ballots cast by the electors of the town of Randolph at the election of 1899 upon the subject of local option in said town.

Wentworth & Wentworth and Norman M. Allen, for relator.

Benjamin F. Congdon, for respondents.

WHITE, J. The moving papers and the affidavits filed on behalf of the respondents show that the electors of the town of Randolph voted upon the local option questions provided for by the Liquor Tax Law, at the biennial town meeting in 1899; that those questions were not at that meeting submitted to or voted upon by said electors in the manner prescribed by law, and the result thereof may be assumed to have been void.

Because of the recognized irregularities in the first submission of the questions, a special town meeting was duly called and held on May 1, 1900, at which said questions were regularly submitted and voted upon and the result thereof declared according to law.

It seems clear to me that the electors, having remedied such irregularities in the manner prescribed by the statute, no effect is to be given to the irregular votes at the regular meeting in 1899, nor to the result of that meeting as declared, and for that reason the motion for the writ of mandamus should be denied, with ten dollars costs to the respondents.

Motion denied, with ten dollars costs to respondents.

Supreme Court, Kings Special Term, July, 1900. Reported. 32 Misc. 210.

Matter of the Petition of HENRY H. LYMAN, State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificates Nos. 10,551, 10,552, 10,553, 10,554, and 10,375, Series of 1899, issued to WILLIAM TEXTER.

1. Liquor Tax Law—A violation thereof forfeits all the certificates which the offender holds.

The Liquor Tax Law permits one person to hold certificates for any number of places where the liquor traffic is carried on, but, if he violates any provision of the said law, he forfeits all his certificates and the right to traffic in liquor anywhere.

2. Same—Application for revocation may include all the places of the offender.

A petitioner for revocation may join several places in one application where one person holds the certificates for all the places.

APPLICATION for an order revoking and cancelling liquor tax certificates.

P. W. Cullinan, for petitioner.

Hirsh & Rasquin, for respondent.

DICKEY, J. The Liquor Tax Law is concerned with individuals holding liquor tax certificates as well as the particular place where business is carried on.

While the law permits one person to hold certificates for different places without number, as I interpret the law, the violation by that individual of any of the provisions of the law will forfeit all tax certificates held by him wherever the premises are situate. It is meant to be drastic in its operations against violators of its provisions so that any offender loses all his rights to traffic in liquors anywhere.

I do not think it objectionable in one proceeding to join several places where certificates are held by the same person. There is no provision in the law forbidding it and the law fairly contemplates it. By section 42 it provides that two or more penalties may be sued for and recovered in the same action.

Ordered accordingly. _____

Supreme Court, New York Special Term, July, 1900. Reported. 32 Misc. 221.

Matter of the Petition of CHARLES E. SCHUYLER, for an Order Revoking and Cancelling Liquor Tax Certificate No. 5,144, Issued April 29, 1899, to JAMES RYAN.

1. Liquor Tax Law—Revocation of certificate not affected by its expiration during the proceeding.

Where a liquor tax certificate holder has violated the statute, a proceeding by a citizen to cancel the certificate is not impaired by the expiration of the license during the pendency of the proceeding.

2. Same—Discharge in criminal proceedings not a bar.

The discharge of the certificate holder, in a criminal prosecution based on the very acts constituting the violation upon which a citizen now seeks under the Liquor Tax Law to procure cancellation of the certificate, is not a bar to the latter proceeding.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

Royal R. Scott, for petitioner.

Zeller & Michling, for respondent.

O'GORMAN, J.: The evidence clearly establishes the violation alleged in the petition. The respondent, however, resists the application to cancel the certificate on two grounds—first, that the license has expired since the commencement of this proceeding; and, secondly, that on a criminal prosecution based on the acts constituting the violation in question the respondent was discharged. Neither ground is tenable. The right to a cancellation, where the evidence warrants it, existed at the date of the institution of the proceeding and can not be impaired by the subsequent expiration of the license. *Matter of Lyman*, 28 Misc. Rep. 408; *affd.*, 48 App. Div. 275; *Hanson v. Howard*, N. Y. L. J., June 12, 1900. Touching the second point, it is sufficient to note that a principal may be held civilly liable for many acts which do not create a criminal liability. Moreover, a proceeding prosecuted by the People of the State can not be regarded as a bar to the prosecution of this proceeding instituted by a citizen.

Let an order be entered revoking the certificate, with costs to petitioner.

Ordered accordingly.

Supreme Court New York Special Term, July, 1900. Reported. 32 Misc. 223.

Matter of the Application of FRANKLIN B. LORD, for the Revocation and Cancellation of Liquor Tax Certificate No. 11,536, Issued to PATRICK COUGHLIN.

Liquor Tax Law—Consents can not be filed *nunc pro tunc*.

The Liquor Tax Law requires the necessary consents of the owners of dwellings to be filed before a certificate is issued, and the court has no power, after a citizen has applied to have the certificate revoked, to permit the holder thereof to file such consents *nunc pro tunc*.

APPLICATION for an order revoking and cancelling a liquor tax certificate.

Lord, Day & Lord, for petitioner.

Lindsay & Griffin, for respondent.

O'GORMAN, J. The Liquor Tax Law makes distinct provision for the filing of the necessary consents before the issue of the certificate. No right is reserved to this court to order the filing of consents thereafter. The filing of papers *nunc pro tunc* is a practice peculiar to the conduct of judicial proceedings, but where a right to a certificate is dependent upon the applicant's prior compliance with certain statutory requirements the court possesses no authority in a summary application of this character to relieve an applicant from the consequences of his neglect to observe those requirements. While the act provides for certain proceedings to vacate or cancel a certificate, and to review the action of an officer who refuses to issue a license, the proceeding now before the court is of an entirely different character, and does not seem to be within the contemplation of the Liquor Tax Law. Even if the power invoked does reside in the court, its exercise would not be proper under the circumstances disclosed.

Application denied.

Supreme Court, Seneca Special Term, July, 1900. Reported 32 Misc. 293.

Matter of the Petition of MATTON C. PIERSON, for an Order Revoking and Canceling Liquor Tax Certificate, No. 28,552, Issued to WILLIAM REIGEL.

Liquor Tax Law—Suspension of traffic—Answers of application not willfully false.

A building, for a long time prior to and on March 23rd, 1896, occupied as a hotel (but not used for traffic in liquors on that day), was burned in September, 1897, was sold to the present owner in April, 1898, the latter in 1898 cleared the ruins and erected a barn, filled the ice-house in 1899, and in the same year completed the present hotel.

Held, that the suspension of traffic did not work a forfeiture of the privilege, conferred by the Liquor Tax Law, a place occupied as a hotel on March 23rd, 1896, exempting it from procuring the consents of owners of buildings occupied exclusively as dwellings.

That, upon such a state of proof, statements in the application for a liquor tax certificate, to the effect that the owner could lawfully carry on traffic in liquors, that consents were not required, and that the place had been occupied for traffic in liquors and for hotel purposes for forty years last past, were not willfully false and did not justify a revocation of the certificate upon the ground of the falsity of said statements.

PROCEEDING under the Liquor Tax Law to revoke and cancel a liquor tax certificate.

Hawley & Carmer, for petitioner.

Hammond & Hammond (J. N. Hammond, of counsel), for respondent.

William E. Schenck, for Seneca County Treasurer.

DUNWELL, J. Proceeding under subdivision 2, section 28 of the Liquor Tax Law, to revoke defendant's certificate to sell liquors at a hotel constructed by him at Canoga, Seneca county, N. Y., upon the ground that his answers to questions in his application for the certificate were false.

The questions and answers in respect to which it is charged that defendant made false statements are as follows:

"May the applicant lawfully carry on such traffic in liquors on said premises? Yes."

"Has the applicant attached hereto the consents required by sec. 17 of said law? Not required."

"Since what date has said place been occupied continuously for such traffic in liquors? Not used for anything else for forty years last past."

"Since about what date have the premises been continuously occupied for such hotel traffic? For nothing else in forty years."

The facts are conceded.

The applicant did not obtain the consents of owners of dwellings within two hundred feet of the hotel building.

He relies upon the fact that the place was occupied as a hotel, March 23, 1896, which brings him within the exception rendering the consents of dwelling-house owners unnecessary.

The building burned September 13, 1897. The then owner sold the premises to the present owner in April, 1898. Following the purchase the present owner, during the year 1898, cleared the ruins, the result of the fire, off the lot, erected a barn thereon, and in the winter of 1899 filled the ice house on the lot, and in the summer of 1899 erected the present hotel building, completing it in October, 1899. He rebuilt the hotel for the purpose of continuing the hotel business and liquor traffic suspended by fire.

It may be questioned whether the answers to the questions above set forth are false in the sense that they are literally untrue. But assuming that they did not fully represent the conditions, by a disclosure of all the facts, do the facts when brought out contradict the answers in the application or change their effect, so as to affect the result of the application?

Petitioner's counsel in his brief properly concedes that the "sole question is, did the suspension and abandonment of the traffic" (by fire), "work a forfeiture of the privilege conferred by section 17, subdivision 8 of the Liquor Tax Law?"

The privilege referred to is the exemption from obtaining consents of the owners of dwelling-houses within two hundred feet of defendant's premises, by reason of the premises being occupied as a hotel March 23, 1896, the date of the enactment of the law.

The exemption reads as follows: "Nor shall such consent be required for any place described in said statement which was occupied as hotel on said last mentioned date (March 23, 1896), notwithstanding such traffic in liquors was not then carried on thereat."

In respect to a hotel the exception attached, although traffic in

liquors was not being carried on thereat when the act took effect. Nor is any limitation of time placed upon a hotel within which its owner must apply for a liquor tax certificate, or lose the benefit of this exception. It would seem, that so long as a hotel, in existence at the time of the passage of the act, is maintained as a hotel, the owner can obtain a liquor tax certificate without the consents of owners of dwellings, even though traffic in liquors is not carried on thereat at the time of the passage of the act or for an indefinite period thereafter.

Nor is there anything in the act to indicate that a suspension of the traffic thereafter would work a forfeiture of the exception so long as the premises are maintained as hotel premises.

It is its character as a hotel that brings the exception, not the traffic.

It must be admitted that if the premises are once abandoned as a hotel, and they lose their character as hotel premises, then they would lose the benefit of the exception.

In the present case it seems that the premises in question had been used as hotel premises for a great many years before the enactment of the statute under consideration. After the buildings burned they were rebuilt within a reasonable time for the same purpose. They were not abandoned as hotel premises or put to any other use. Under such circumstances, a reasonable time elapsing for rebuilding does not terminate the rights or privileges attached to the premises. *Matter of Kessler*, 163 N. Y. 205.

"The false statements in an application for a certificate which will justify its revocation under the statute must relate to some material matter of fact, and it must be shown that such fact was wilfully misstated by the applicant. If the statement relates to some matter of law, as to which the applicant is ignorant or misinformed, that will not be sufficient to warrant the court in canceling a certificate." *Id.*

"A temporary suspension of the traffic, resulting from an accident such as the destruction of the building by fire, or the like, will not operate to affect the right attached to the premises under the law." *Id.*

I conclude that the answers were not false as material misstatements of fact within the meaning of the statute, and that the destruction of the building by fire, taking into account the circumstances of rebuilding, was not such a suspension as worked an abandonment of the premises as a hotel, and the premises have

not lost the rights included in the exception referred to, and the consents of the dwelling-house owners were not necessary to the application in this case.

The proceeding must be dismissed, but as the statute is new and the decisions are conflicting, without costs.

Proceeding dismissed, without costs.

County Court, Ulster County, July, 1900. Reported. 32 Misc. 303.

Matter of the Petition of GEORGE W. WASHBURN, for an Order Revoking and Canceling Liquor Tax Certificate, No. 22,671, Issued to PASQUALE DELLA MORTE.

Liquor Tax Law—Revocation—Stay on appeal not permissible.

Where proceedings, taken to revoke a liquor tax certificate for the falsity of material statements contained in the application therefor, have resulted in an order of revocation and the same has been entered and served, the court has no power to grant a stay of proceedings pending an appeal from the order.

PROCEEDINGS under the Liquor Tax Law, section 28.

Motion by defendant for a stay upon an appeal.

Charles F. Cantine, for petitioner.

Brinnier & Searing, for defendant.

William E. Schenck, for Ulster County Treasurer.

VAN ETEN, J. An order was made in the above-entitled proceeding revoking and canceling the liquor tax certificate issued to Pasquale Della Morte on the ground that the consents of property owners had not been obtained as required by section 17 of the Liquor Tax Law.

It appeared upon the hearing that there were two houses occupied exclusively as dwellings within two hundred feet of the saloon where liquor was sold under said certificate, and that the consents of the owners of said dwellings had not been obtained.

In the application for said certificate said defendant stated that there were no houses within two hundred feet of said saloon. This was false. The Liquor Tax Law (§ 28), provides that proceedings may be taken to revoke and cancel the certificate, among other things, "if the consents required by section 17 are not properly filed as required by said section." It further provides that if the evidence establishes such facts, an order shall be granted revoking and canceling the certificate, and "said order *shall* also provide that the holder of said liquor tax certificate, or any other person having such certificate in his possession or under his control, *shall forthwith* surrender said certificate to the officer who issued the same, or his successor in office." Also that all the rights of the holder of said certificate shall cease upon the filing and service of said order, and that the said certificate shall be *immediately* surrendered to the officer who issued the same.

This proceeding is of a summary nature, and is intended to immediately stop persons from selling liquor who have not the lawful right to do so.

A stay of proceedings after entry and service of the order is not contemplated by said act.

It was held in *Matter of Auerbach to Revoke and Cancel Liquor Tax Certificate Issued to Johannsen*, 31 Misc. Rep. 46, that "the order is self-executing, and upon its entry and due service the rights of the holder by virtue of the certificate 'shall cease.' Therefore, a stay, operating only upon future proceedings, cannot affect the legal status of the party as already fixed by law, and with or without a stay, his further acts under the certificate would be in violation of the penal provisions of the statute."

The application for a stay is, therefore, denied.

Application denied.

Second Appellate Department, July, 1900. Reported 53 App. Div. 330.

In the Matter of the Petition of HENRY H. LYMAN for an Order Revoking and Canceling Liquor Tax Certificate No. 10,551, Issued to EDWARD MALONEY.

CONGRESS BREWING COMPANY, Appellant; HENRY H. LYMAN, as Commissioner of Excise of the State of New York, Respondent.

Liquor tax certificate—Proceeding for its cancellation—Effect, on the rights of an assignee of the certificate, of an adjournment of the motion, in order to make service on the person to whom it was issued—Who is the holder.

After the assignee of a liquor tax certificate had surrendered the same for the purpose of procuring the rebate for the unexpired term, the State Commissioner of Excise instituted a proceeding for the revocation of the certificate, under section 25 of the Liquor Tax Law (Laws of 1896, chap. 112), upon the ground that the person to whom it was issued continued to traffic in liquor after its surrender. The proceeding was begun by an order to show cause, returnable in ten days, directed to the officer who issued the certificate, to the person to whom it was issued and to the assignee. On the return day it appeared that the person to whom the certificate was issued could not be found, and the court thereupon adjourned the motion for ten days without objection on the part of the assignee, who had appeared by counsel. Subsequently an *ex parte* order was granted extending the return day of the original order to show cause to the day to which the motion had been adjourned.

Held, that, as against the assignee, the extension of the original order to show cause did not—under subdivision 2 of section 28 of the Liquor Tax Law, providing that upon the presentation of a petition for the revocation and cancellation of a liquor tax certificate, “the justice or court shall grant an order requiring the holder of such certificate, and the officer who granted the same, or his successors in office, to appear before him, * * * not more than ten days after the granting thereof;” and that “a copy of such petition and order shall be served upon the holder of such certificate, and the officer granting the same, or his successor in office, in the manner directed by such order, not less than five days before the return day thereof”—operate to deprive the court of jurisdiction of the proceeding.

Quaere, whether the assignee was not the “holder” of the certificate, within the meaning of the statute.

APPEAL by the Congress Brewing Company from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the

13th day of July, 1899, revoking and canceling a liquor tax certificate issued to one Edward Maloney.

Everett Caldwell, for the appellant.

Herbert H. Kellogg, for the respondent.

WOODWARD, J. On the 28th day of October, 1898, liquor tax certificate No. 10,551 was issued to Edward Maloney of the borough of Brooklyn, and simultaneously with the issuing of said certificate Mr. Maloney made an assignment of the same to the Congress Brewing Company, Limited, as security for the repayment of the money advanced by the brewing company for the procuring of the certificate. On or about the 25th day of November, 1898, the brewing company took possession of the said liquor tax certificate, and, under the power of attorney embodied in the written assignment, on the thirtieth day of November petitioned the State Commissioner of Excise for a surrender and cancellation of the liquor tax certificate and for the rebate provided by section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312). This section provides for the repayment of a portion of the tax under certain regulations, after the voluntary surrender of the certificate, and among the conditions is the provision that "if within thirty days from the date of the receipt of such certificate by the state commissioner of excise, the person surrendering such certificate shall be arrested or indicted for a violation of the liquor tax law, or proceedings shall be instituted for the cancellation of such certificate, or an action shall be commenced against him for penalties, such petition shall not be granted until the final determination of such proceedings or action," and the rights of the party surrendering the certificate are to be determined by the result of such proceedings or action.

On the 27th day of December, 1898, this proceeding for the revocation and cancellation of the certificate was begun by the respondent, Henry H. Lyman, State Commissioner of Excise, and the proceeding was based upon the allegations that Edward Maloney continued to traffic in liquor after the certificate had been surrendered. Upon the petition of Henry H. Lyman an order to show cause was granted on the 27th day of December, 1898, returnable on the 6th day of January, 1899, at a Special Term of the Supreme Court, requiring Edward Maloney, the

Congress Brewing Company and Harry W. Michell, the officer who issued the certificate, to show cause why an order should not be granted revoking and canceling the said liquor tax certificate. On the return day Edward Maloney did not appear. Harry W. Michell appeared and answered, joining in the prayer of the petition, and the Congress Brewing Company appeared by counsel. The petitioner applied for an adjournment until the 16th day of January, 1899, on the ground that Edward Maloney had not been served, and the motion was adjourned until that date. Subsequently an *ex parte* order was granted by a justice of this court, extending the return day of the original order to show cause to January 16, 1899, the same day to which the motion was adjourned, and upon the latter date counsel for the appellant, the Congress Brewing Company, appeared and raised the preliminary objection that the court had lost jurisdiction in the proceeding, on account of the return day of the order to show cause having been extended so as to make it returnable more than ten days from the granting thereof, and this is the question presented on this appeal, the statute requiring that the order to show cause shall be made returnable on a day specified therein, not more than ten days after the granting thereof. The court reserved decision upon the objection until the coming in of the referee's report, and granted an order of reference. A hearing was had before a referee, the evidence clearly establishing the facts set forth in the petition, and on the motion made upon the report of the referee, the order appealed from, canceling and revoking the liquor tax certificate, was granted.

The only question raised by this appeal is that as to the jurisdiction of the court, and upon this point we are of opinion that the appellant's contention is without merit. While the original order to show cause was directed to be served upon Edward Maloney, it is not clear that such service was necessary under the statute, or that any injustice resulted by reason of his failure to appear in the proceeding. There is no doubt that Mr. Maloney could sell and assign his interest in the liquor tax certificate in question, either absolutely or in the way of security for the money advanced by the brewing company (*Niles v. Mathusa*, 20 App. Div. 483), and it is not disputed that the brewing company reduced the certificate to possession under the provisions of the assignment made by Mr. Maloney for the purpose of surrendering the same

and recovering the amount of the rebate allowed by law. It cannot be doubted that the liquor tax certificate conferred upon Mr. Maloney a property right (*Niles v. Mathusa, supra*), and that the assignment to the brewing company, coupled with the actual possession of the certificate, gave to the appellant all of the rights of property which Mr. Maloney had in the certificate. To quote the language of the court in the *Niles* case: "Although, to enable the latter as an assignee to carry on the business under the certificate, it was necessary for it to obtain the consent of the officer who issued the same, yet the assignment must necessarily precede such consent. And if such consent to an assignment was necessary when, as in this case, the assignee merely desired to surrender the certificate and recover the cash value thereof, as we have seen, it could not be arbitrarily refused, but under the provisions of section 28 the officer who issued the same could be compelled to grant it." This being true, the brewing company was the absolute owner of the liquor tax certificate now under consideration, and subdivision 2 of section 28 of the Liquor Tax Law provides that upon the presentation of a petition for the revocation and cancellation of a liquor tax certificate, "the justice or court shall grant an order requiring the holder of such certificate, and the officer who granted the same, or his successors in office, to appear before him, or before a Special Term of the Supreme Court of the judicial district, on a day specified therein, not more than ten days after the granting thereof"; and that "a copy of such petition and order shall be served upon the holder of such certificate, and the officer granting the same, or his successor in office, in the manner directed by such order, not less than five days before the return day thereof." The brewing company, as the owner of all of the property rights in this certificate, was served with the order to show cause, and if it was not the "holder" of this certificate, within the meaning of the statute, who was? Mr. Maloney was not the "holder"; he not only had no property in the certificate, but it had actually passed from his possession into the hands of the brewing company, whose right to the rebate depended upon the conditions prescribed by the statute. If Mr. Maloney had any rights in the premises, they are not such as relate to the property in his certificate, and he is not in court asking for any relief. The object of the statute was to give notice to persons having an interest in the certificate, and as the brewing company was the owner of all the property rights in the

certificate, service of the order upon the brewing company was sufficient to place upon it the duty of protecting its rights in the proceeding by showing cause why the certificate should not be revoked and canceled. There is no dispute that Mr. Maloney sold liquor after the liquor tax certificate was removed from his place of business by the appellant under authority of the assignment, and as the right to a rebate depends upon the conduct of the party to whom the certificate is granted during a specified time, there is no good reason why the order appealed from should be disturbed because a party having no interest in the certificate was not served with the order in time for his appearance in common with the brewing company and the officer granting the certificate.

But, were it necessary that Mr. Maloney be served with the order, there is no reason why this court should hold that the Liquor Tax Law contemplated any unreasonable rules of practice in connection with the administration of the law. The order to show cause was directed to be served upon Mr. Maloney in common with the other parties, but from the affidavit of George B. Buttlng it appears that a diligent search failed to discover his whereabouts up to the day fixed for the return of the order on the 6th of January, 1899. On this date, and because of the failure to serve Mr. Maloney, the matter was adjourned until the sixteenth day of January. Subsequently an order of the court was made directing the service of the order by mailing it to the last known address of Mr. Maloney, and the original order to show cause was extended to the sixteenth day of January. This placed the return day more than ten days from the date of the original order but not more than ten days from the granting of the substituted order; and as all of the parties in interest were before the court on the 6th day of January, 1899, with the possible exception of Mr. Maloney, and made no objection to the postponement of the matter, it is not clear what right they have to interpose objections on behalf of Mr. Maloney, who does not appear to have been aggrieved by the order appealed from. The postponement in the presence of the appellant's attorney, without objection, was equivalent to a new order to show cause returnable on the sixteenth day of January, in so far as the appellant is concerned, and the service of the extended order by mailing the same with the papers to the last known address of Mr. Maloney was, in so far as he is concerned, a new order, returnable within

ten days. The fact that it was not served "not less than five days before the return day thereof," as required by the statute, while available to Mr. Maloney, perhaps is, under the circumstances of this case, insufficient to justify relief to the appellant, which makes no suggestion that the result of the proceeding would have been any more favorable to it had Mr. Maloney been brought within the jurisdiction of the court.

The order appealed from should be affirmed, with costs.

All concurred.

Order affirmed, with costs.

Second Appellate Department, July, 1900. Reported, 53 App. Div. 470.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE JOSEPH FALLERT BREWING COMPANY, LIMITED, Respondent, v. HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant.

Payment of the rebate on the surrender of a liquor tax certificate—What establishes an acquittal and dismissal of a charge of a violation of the Liquor Tax Law.

The proceedings on an examination upon a charge of having violated the Liquor Tax Law before a magistrate who "found there was not sufficient evidence to hold defendant for trial" and discharged him, constitute an acquittal and dismissal on the merits within the meaning of the provision of that law relating to the payment of the rebate upon the surrender of a liquor tax certificate.

APPEAL by the defendant, Henry H. Lyman, as State Commissioner of Excise of the State of New York, from an order of the Supreme Court, made at the Queens County Special Term and entered in the office of the clerk of the county of Queens on the 4th day of April, 1900, directing that a peremptory writ of mandamus issue directing him to pay to the relator the rebate due on the surrender by it for cancellation of liquor tax certificate 22,573.

P. W. Cullinan, for the appellant.

Anson B. Cole [*Moses Weinman* with him on the brief], for the respondent.

JENKS, J. The relator, as assignee of a liquor tax certificate, surrendered it in proceedings for a rebate, and received a receipt from a county treasurer, as authorized by section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312). The Special Term ordered a peremptory writ of mandamus to the State Commissioner of Excise and the comptroller of New York city to pay the amount of such rebate, and the said State Commissioner appeals.

There was a preliminary objection that the petition for the writ does not set forth sufficient facts, in that it fails to allege that the assignors of relator, the holders of the liquor tax certificate, voluntarily ceased to traffic in liquors at the premises for which said certificate was granted. The provisions of the present law for rebate which, as the Court of Appeals has said, give a commercial value to the certificate, are hedged in with conditions which qualify the absolute right to receive such refund. (*People ex rel. Miller v. Lyman*, 156 N. Y. 407, 411.) The proceeding for a refund contemplates the application to the county treasurer and the issuance of his receipt that states the amount of the rebate, which is payable at the end of thirty days, provided the law is not violated meanwhile. Section 25 of the law in part provides that if a "person holding a liquor tax certificate * * * against * * * whom no complaint * * * is pending, * * * shall voluntarily and before arrest * * * cease to traffic in liquors during the term for which the tax is paid under such certificate, such * * * person or their duly authorized attorney, may surrender such tax certificate to the officer who issued the same, * * * and at the same time shall present to such officer a verified petition setting forth all facts required to be shown upon such application. Said officer shall thereupon compute the amount of *pro rata* rebate * * * and shall execute duplicate receipts, * * * together with the amount of rebate due thereon, * * * the name of the person entitled to receive the rebate, the locality liable for two-thirds of such rebate, and the name and title of the fiscal officer thereof. One of such receipts said officer shall deliver to the person entitled thereto."

This application is against the disbursing officers, and necessarily is based upon due preliminary procedure. The receipt of the county treasurer is the basis of the rebate, and could not lawfully have been issued unless the petitioner theretofore had shown to the county treasurer a cessation of traffic in liquors. The

relator shows a surrender of the certificate and makes the resultant receipt part of its petition. When it had obtained the receipt it had taken one step in the procedure, and I see no reason why, in its motion against the disbursing officers, it should recite any of the facts that must have been shown to the county treasurer before the receipt could lawfully have been issued. It is true that the petitioner must set forth such facts as make it the duty of the officers to pay the rebate. But the holding of the receipt is a fact. The petitioner must show both the issuance and life of the receipt and that it had not violated the conditions of the statute, and so, if it had been arrested or indicted for a violation of the Liquor Tax Law, that it had been acquitted, and that any proceedings or action based upon the alleged violation had been dismissed on the merits. The petition, therefore, shows *inter alia* that, on the 26th day of September, 1899, one of the holders of the certificate was arrested for violation of this law, was arraigned in the City Magistrate's Court, third district, borough of Queens, city of New York, on the same day, was duly tried on the 22d day of November, 1899, to which day the trial was adjourned, was acquitted, and that the action against her was dismissed on the merits. A certificate thereof of the clerk of such court is made a part of the petition.

The answering affidavit sets forth that the certificate holders did not voluntarily cease to traffic in liquors, and alleges, upon information and belief, that on the second day of September they trafficked with one John C. McDonough, selling to him and to one Woods two glasses of whisky; that thereafter McDonough made complaint, and on September 9, 1899, notified the district attorney of Queens county by filing a statement under oath. I think that the violation of the law referred to in the petition and the violation alleged in the answering affidavit may be held identical. The petitioner shows an arrest of Esther Samuels on September 26, 1899, and an arraignment on the same day in a City Magistrate's Court in the third district of Queens borough, New York city. The answering affidavit states a violation by Esther Samuels on September 2, 1899, complaint thereon September 5, 1899, a notification to the district attorney of Queens on September 9, 1899, and alleges that the complainant was John C. McDonough. This is the sole violation charged. The certificate of the clerk of the court incorporated in the petition shows that the proceeding disposed of after the arrest on September 26, 1899,

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was entitled "*People on Complaint of John C. McDonough against Esther Samuels.*"

The further question is whether the petitioner was acquitted and whether the proceeding was dismissed on the merits within the intendment of the Liquor Law. The certificate of the clerk shows that on examination the magistrate "found there was not sufficient evidence to hold defendant for trial. Defendant was, therefore, discharged on that date." "Merits" implies a consideration of substance, not of form; of legal rights, not of mere defects of procedure or the technicalities thereof. (*St. John v. West*, 4 How. Pr. 331; *Tracy v. N. Y. Steam Faucet Co.*, 1 E. D. Smith, 349; *Megrath v. Van Wyck*, 3 Sandf. 750.) If the evidence on examination of the defendant was not sufficient to order her trial, a discharge was her legal right. (Code Crim. Proc. § 207.) The purpose of the provision of section 25 of the Liquor Tax Law is to defeat the rebate in case of violation of law. If such a violation has been charged, the payment of the rebate must wait the final determination of any action or proceedings based upon the violation. So far as the particular proceeding in question is concerned, the action of the magistrate is final. It is not alleged that any new proceedings were ever instituted. I think that this disposition may be regarded as an acquittal and a dismissal upon the merits within the intendment of the law, inasmuch as the magistrate found that there was no evidence sufficient to warrant a trial. The word "acquittal" is said to be *verbum equivocum*, in ordinary language, used to express the verdict of a jury or the formal judgment of the court that the prisoner may go therefrom without day. (1 Am. & Eng. Ency. of Law [2d ed.], 572.) And so the word "acquitted" means "set free or judicially discharged from an accusation, released from a * * * charge or suspicion of guilt." (Id. 573, citing *Teague v. Wilks*, 3 McCord [S. C.], 461, where the contention was that the allegation that the plaintiff had been acquitted by the grand jury's finding of no bill was not, in contemplation of the law, an acquittal.) In *Secor v. Babcock* (2 Johns. 203) it appeared that upon examination the justice dismissed a criminal charge on the ground of lack of proof, and in an action for malicious prosecution the court says: "The acquittal was lawful," and that there was sufficient ground for the suit. There was no further step in criminal procedure which the defendant in that proceeding could take to obtain a further or a more conclusive judgment on the merits in

her favor. And yet if the discharge be not an actual acquittal and a dismissal on the merits, within the spirit of this statute, lack of evidence to warrant a trial and a discharge therefor would have the same practical effect in rebate proceedings as a conviction, which is absurd.

In the 8th paragraph of the answering affidavit the defendant denies, upon information and belief, that on the 22d day of November, 1899, the said Esther Samuels was duly tried in the City Magistrate's Court, third district, borough of Queens, city of New York, upon the charge of violating the Liquor Tax Law as above set forth, and denies that all proceedings against her were dismissed upon the merits as set forth in the 6th paragraph of the petition herein. It may be that, technically considered, the proceedings had were not a trial, inasmuch as they were dismissed at the hearing before the magistrate, in that there was no evidence to warrant or require a trial, but I have stated my reasons for the conclusion that the disposition of the proceedings met the requirements of the statute, and was an acquittal and dismissal on the merits within the purview thereof. Nothing stated in this paragraph of the affidavit shows that there is any dispute as to the facts of an arrest upon McDonough's complaint, and of an examination and a discharge on the merits, as I interpret the statute, and so the denials may be based solely upon the defendant's interpretation of the law. In *People ex rel. Beck v. Coler*, (34 App. Div. 167, 170) this court, per CULLEN, J., says: "While the rule is strict that all facts averred in answer to an application for a peremptory writ, whether of an affirmative character or merely denials, must be taken as true, the rule is equally strict that 'Affirmations which are only conclusions of law or fact, or are indefinite or general statements are of no avail and worthless,' and 'A denial in gross without stating facts is a mere conclusion.' (*Matter of Freel*, 73 N. Y. St. Repr. 331; *Matter of Guess*, 16 Misc. Rep. 306.) "

The order should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Fourth Appellate Department, July, 1900. Reported. 53 App. Div. 576.

In the Matter of the Petition of LOUIS N. LOPER and GEORGE H. BAKER for the Revoking and Canceling the Liquor Tax Certificate Issued by FRANK P. WEAVER, the County Treasurer of Niagara County, N. Y., to DANIEL SLATTERY and JAMES J. HAMMOND, Composing the Firm of SLATTERY & HAMMOND.

DANIEL SLATTERY and JAMES J. HAMMOND, Composing the Firm of SLATTERY & HAMMOND, Appellants; LOUIS N. LOPER and GEORGE H. BAKER, Respondents.

Liquor tax certificate—Effect of its surrender by a tenant who has agreed to continue the liquor business—Consents of owners of dwellings within 200 feet when, in such a case, not required.

In a proceeding to revoke a liquor tax certificate it appeared that on the 23d day of March, 1896, when the Liquor Tax Law (Laws of 1896, chap. 112) went into effect, and until January 29, 1900, certain premises were occupied by a tenant engaged in the business of trafficking in liquors under a verbal lease with the owner thereof, for which the tenant paid a monthly rent in advance. On April 29, 1899, such tenant obtained a certificate from the county treasurer authorizing her to continue the traffic in liquors upon the premises until May 1, 1900.

On the 17th of January, 1900, the premises were purchased, for the purpose of carrying on traffic in liquors thereupon, by third parties who desired immediate possession, but, at the request of the tenant, consented that she occupy the premises for the purpose of a saloon until March 1, 1900, she obligating herself to continue the traffic in liquor thereon up to that date. On January 29, 1900, without any notice to such purchasers or any knowledge on their part of her intentions, the tenant surrendered her liquor tax certificate and received the rebate thereon. When, on February 1, 1900, one of the purchasers collected the rent for that month, the tenant did not inform him that she had surrendered her certificate, and there was no change in the premises or their occupancy which would in any manner indicate that such traffic had been discontinued.

On the 17th of February, 1900, such purchasers applied to the county treasurer for a liquor tax certificate to carry on liquor traffic upon these premises, which was issued to take effect February 1, 1900, and run to May 1, 1900.

Held, that the secret act of the tenant in surrendering her liquor tax certificate, which was done in violation of her agreement with the purchasers of the premises, did not destroy their privilege to use the premises for the purpose of trafficking in liquors;

That, in such a case, it was not necessary for the purchasers, before they could become entitled to a certificate, to obtain a consent to such traffic on the premises, signed by the owner or owners of at least two-

thirds of the buildings exclusively occupied for dwellings situated within 200 feet of said premises;

That, such vested privilege and right to traffic in liquor on the premises having been by statute annexed to the premises on March 23, 1896, their use as such should, and might, be continued within the true intent and spirit of the law until the owner should forfeit such right by devoting or consenting to or acquiescing in the devotion of the premises to another use, or should by some act manifest an intention to suspend or abandon their use for the purpose of trafficking in liquor. (Per LAUGHLIN, J.)

That the renting of premises for liquor traffic is sufficient to preserve the landlord's right to continue the use of the premises therefor, even in the absence in the lease of an express agreement that trafficking in liquor shall not be suspended, provided that the landlord, upon learning of a suspension of the traffic by the tenant, exercises due diligence in resuming possession and continuing the right. (Per LAUGHLIN, J.)

SPRING and WILLIAMS, JJ., dissented.

APPEAL by the defendants, Daniel Slattery and James J. Hammond, composing the firm of Slattery & Hammond, from an order of the Supreme Court, made at the Niagara Special Term and entered in the office of the clerk of the county of Niagara on the 14th day of March, 1900, revoking the liquor tax certificate issued to them by the county treasurer of Niagara county.

The proceeding was commenced by petition dated February 21, 1900, under subdivision 2 of section 28 of chapter 112 of the Laws of 1896, passed March 23, 1896, as amended by Laws of 1897, chapter 312, to revoke and cancel a liquor tax certificate issued by the county treasurer of Niagara county to the appellants, dated February 17, 1900, and to run from February 1, 1900, to May 1, 1900.

Richard Crowley, for the appellants.

G. D. Judson, for the respondents.

McLENNAN, J. The facts in this case are not in dispute, and are of such a character as to present the interesting question whether privileges which attach to real property by virtue of a statute may be destroyed or materially impaired without the knowledge or consent of the owner by the secret act of a tenant done in violation of his agreement of lease.

The premises in question, situate in Gasport, in the town of Royalton, Niagara county, N. Y., were owned by one Charles Hathaway prior to March 23, 1896, when the Liquor Tax Law

(Laws of 1896, chap. 112), so-called, went into effect, and until the 17th day of January, 1900, at which time they were purchased by the appellants. At the time the Liquor Tax Law went into effect, and continuously thereafter until the 29th day of January, 1900, the premises had been occupied as a saloon and for the purpose of trafficking in liquors by one Mary A. Knights under a verbal lease with Hathaway, she paying rent monthly in advance. On April 29, 1899, Mary A. Knights obtained a certificate from the county treasurer authorizing her to continue the traffic in liquors until May 1, 1900.

The premises were purchased by the appellants for the purpose of carrying on traffic in liquors thereon, and are very much more valuable for that purpose than for any other, and unless they can be occupied for such purpose are of comparatively little value to the purchasers.

Within a day or two after purchasing the premises the appellants informed Mary A. Knights, who was then in possession of said premises and engaged in carrying on the business of trafficking in liquors thereon, of their purchase, and notified her that they desired immediate possession of the premises for the purpose of continuing such business, to which they were entitled under their deed of conveyance. Mrs. Knights asked the appellants to permit her to continue in possession of said premises until the 1st day of May, 1900, the time when her liquor tax certificate would expire, to enable her to get another place. This the appellants refused to do, but for the purpose of accommodating her they consented that she might occupy the premises until March 1, 1900, for the purpose of a saloon and for carrying on the traffic in liquors as she was then doing, which she agreed to do, and to pay for the use of said premises the sum of twenty-five dollars per month up to March 1, 1900, and then to surrender possession of the same.

At the same time it was verbally agreed and understood between said Mary A. Knights and the appellants that if she had any liquors or supplies on hand March 1, 1900, they would take them from her at a price to be agreed upon.

On the 29th day of January, 1900, ten or twelve days after this arrangement was made, Mrs. Knights, without any notice to the appellants, or any knowledge either directly or indirectly on their part of her intention so to do, surrendered her liquor tax certificate to the county treasurer of Niagara county and received the

rebate thereon. On February 1, 1900, two days after such surrender, one of the appellants went to the saloon to collect the rent due, which was paid, and Mrs. Knights did not inform him that she had surrendered her certificate, and there was no change in the premises or their occupancy which would in any manner indicate that traffic in liquors upon the premises had been discontinued. At that time all the saloon fixtures and furniture were in place; the sign "Henry A. Knights" that being the name under which said business had been carried on, was over the door; on the side of the building were the words "Hathaway & Gordon's Porter and Ale," and on that occasion, February 1, 1900, Mrs. Knights said to one of the appellants that if anything should happen by which they would not carry on the saloon business in the building, or if they should be unable to obtain a license therefor, she would like to rent the premises and continue the business.

On the 17th day of February, 1900, the appellants made application to the county treasurer for a liquor tax certificate authorizing them to carry on the business of trafficking in liquors at the place in question, and obtained a certificate therefor, to take effect on the 1st day of February, 1900, and to run until May 1, 1900.

On the 1st day of March, 1900, Mrs. Knights vacated the premises and the appellants went into possession and commenced trafficking in liquors under such certificate. They found in the premises bar fixtures, tumblers, glasses, bottles, extracts for making mixed drinks, a small quantity of ale and some saloon furniture. There was nothing to indicate that the traffic in liquors had been discontinued by Mrs. Knights previous to her removal.

The certificate so obtained by the appellants is sought to be revoked by this proceeding, for the reason and upon the sole ground that Mary A. Knights had discontinued the traffic in liquors at the place in question on the 29th day of January, 1900, and that, therefore, the appellants were not entitled to receive the certificate in question, they not having obtained the consent in writing that traffic in liquors should be carried on in the premises, executed by the owner or owners of at least two-thirds of the buildings exclusively occupied for dwellings, situated within two hundred feet of said premises. Upon these facts and under those circumstances the certificate issued to the appellants was revoked, and from the order revoking the same this appeal is taken.

If the order appealed from is to stand, it follows that a tenant

may at will seriously impair the rights of his landlord in leased premises, and that the landlord is powerless to protect himself against loss or injury thereby. The privilege which attached to the property in question, to sell liquor without the consent of those living within two hundred feet of the premises, was a valuable one, and, as appears by the evidence in this case, constituted the chief value of the premises. Under the arrangement made by the appellants with Mrs. Knights she obligated herself to preserve such privilege; obligated herself to continue the business of trafficking in liquors until she surrendered possession to the appellants March 1, 1900, when, under the license obtained by them, they would be entitled to continue the same business. Without the knowledge or consent of the appellants, whether upon her own motion or acting in collusion with the petitioners does not clearly appear, Mrs. Knights, by her secret act, in effect sought to destroy the valuable privilege which attached to the leased premises, to wit, the right to traffic in liquors upon the premises in question without obtaining the consent of the adjacent owners. We think such a construction of the statute is unreasonable and ought not to prevail.

It is not contended or suggested that the agreement made by the appellants with Mrs. Knights was not made in good faith, and apparently it was made for the very purpose of preserving their right to continue the business of trafficking in liquors upon the premises in question. The arrangement was a reasonable one. Upon their purchase they had a right to enter into immediate possession; were entitled to a liquor tax certificate as matter of right, but for the purpose of accommodating the then tenant they permitted her to remain in possession upon the express agreement that she would continue the traffic in liquors until the 1st day of March, 1900, at which time the appellants were to enter into possession and themselves continue such traffic. As we have seen, secretly, without any knowledge on the part of the appellants, and without any opportunity to obtain such knowledge, in violation of her agreement, Mrs. Knights in fact discontinued her business, although to all outward appearances it was continued, and by such means it is sought to substantially destroy the value of the premises purchased by the appellants.

So far as we have been able to discover, the precise question here involved has not been passed upon by the courts of this State. The cases cited upon the respondents' brief we think do

not apply. In those cases a tenant of premises, who was engaged in trafficking in liquors, discontinued such business and afterwards vacated the premises, and a subsequent lessee sought to engage in the business of trafficking in liquors on such premises under a certificate issued to him. In all these cases it was held that the discontinuance of the traffic by the first tenant was conclusive upon the subsequent tenant, and that the certificate was properly revoked. In those cases there was no agreement between the owner and the first tenant that such tenant would carry on the liquor business in the leased premises, and in any event such agreement would not be available to the subsequent tenant.

It is undoubted that if the owner of real property occupied as a saloon leases it without restriction as to its use, the lessee may discontinue its use as a saloon and use it for any other legitimate purpose, and thereby divest the property of the privilege which would have attached to it under the statute if its use as a saloon had not been discontinued.

Suppose, on the other hand, that the owner of premises valuable only for use as a saloon, leases them for a term of years, upon the express agreement on the part of the tenant that he will carry on the business of trafficking in liquors therein continuously during the term of the lease. Could such tenant, a day or two days before the expiration of such term, secretly and without the knowledge or consent of the landlord, surrender his liquor tax certificate, discontinue the business, and thereby deprive the property of the valuable privilege which otherwise would attach to it under the statute? If so, then the owner of such property is absolutely without the means of protecting himself against the act, malicious or otherwise, of the tenant. If the lease in the case supposed provided for re-entry in case the tenant discontinued the traffic in liquors, it would afford no protection, because, as in the case at bar, the discontinuance might be done secretly, and in such way that the owner could have no means of knowing the fact.

The provision of the statute under consideration was construed in *Matter of Kessler* (163 N. Y. 205), and it was considered that it should be interpreted in a reasonable manner rather than literally. In that case the certificate was sought to be revoked on the ground that the applicant had made a false statement in his application. The alleged false statement was to the effect that the premises had been continuously occupied for traffic in liquors. It appeared that, at the time the statement was made,

the business of trafficking in liquors had been discontinued for three months, because of the fact that a portion of the premises had been destroyed by fire. At the time of the application the premises were being rebuilt or repaired with all reasonable speed, and with the *bona fide* intention of the applicant to resume business as soon as the work was completed. It was held that a revocation of the certificate in that case was error. Judge O'BRIEN, in writing the opinion of the court, says: "The false statements in an application for a certificate which will justify its revocation under the statute must relate to some material matter of fact, and it must be shown that such fact was wilfully misstated by the applicant. If the statement relates to some matter of law, as to which the applicant is ignorant or misinformed, that will not be sufficient to warrant the court in canceling a certificate. * * * It appears from the record that the premises in question were actually used for the liquor traffic on the day mentioned (March 23rd, 1896) and continuously thereafter until, the 22d day of April, 1898, the then occupant procured a new license, which expired on May 1st, 1899. This license was transferred to Cashin on the 20th of April, 1899. It appears that, at this date, the business was temporarily suspended, for the reason that the building, or a portion of it, had been destroyed by fire on the 19th of February previous, and it was not repaired or rebuilt, so as to permit the conduct of the business therein until the 19th of May following. Unless this temporary suspension of the traffic was sufficient to deprive the place of the right to a license reserved in the general law to places where the traffic was being conducted at the date of its passage, the statements of the petition were not false within any fair construction of the statute. The suspension was due entirely to the fact that the place had been wholly or partially destroyed, since there was no intention to abandon the business, but, on the contrary, to resume it as soon as the building was in a proper condition for that purpose, and it was actually resumed by Cashin under the certificate in question as soon as the place was put in a suitable condition for the business.

"The provision of the statute which secures the right to a license for a place where the business is conducted at the time of the passage of the law, does not require that the traffic should be continuous under any and all circumstances. The plain purpose of the law was that when the business in such places has

been once abandoned it should not be resumed, except with the consent of the residents, as pointed out in the statute. A temporary suspension of the traffic, resulting from an accident, such as the destruction of the building by fire, or the like, will not operate to affect the right attached to the premises under the law."

It seems to us that it would be even more unjust and inequitable to hold that the certificate of the appellants should be revoked because of the statement contained in their application than in the case decided by the Court of Appeals. In that case the traffic in liquors was suspended for several months by the destruction of the building by fire, and through no fault of the applicant. In the case at bar the legal traffic in liquors was suspended only for a few days, through no fault of the owners, without their knowledge or consent, and under such circumstances that they were powerless to prevent the same, and it is quite apparent that the actual traffic was continued until the removal of Mrs. Knights from the premises. The appellants, for the purpose of accommodating the tenant, and under the express agreement on her part that she would continue the traffic in liquors until she surrendered possession to them, consented to permit her to occupy the premises for a few days. During those few days, by her conduct, of which the appellants had no knowledge, she has made it impossible, if the order appealed from is to stand, for the appellants to occupy the premises for the purpose for which they were purchased, and for the only purpose to which they are adapted.

We are of the opinion that a fair, reasonable and just interpretation of the statute requires that the order appealed from should be reversed.

ADAMS, P. J., concurred; separate opinion for reversal by LAUGHLIN, J.; dissenting opinion by SPRING, J., in which WILLIAMS, J., concurred.

LAUGHLIN, J. (concurring): It appears uncontroverted that Slattery & Hammond purchased the premises for the purpose of personally conducting a saloon thereon; that they could not obtain immediate possession as Mrs. Knights, the monthly tenant of the grantor, was in possession, having paid the rent for the month of January and desired to remain; that they arranged

with her to vacate on the first of March, which was the earliest date on which they could have obtained possession against her will; that it was expressly understood that she would continue the business, and she led them to believe that she would not surrender her liquor tax certificate until that date; that they agreed to and did subsequently purchase all bar fixtures, saloon furniture and liquors which she had on hand; that the saloon signs and government cigar and liquor license remained up, and the liquors, fixtures and furniture remained as they were in use by her before suspending, and she continued to occupy the premises until March first precisely as before, excepting that no liquor was sold thereon after the surrender of her certificate; that the premises were not during said time used for any other purpose. The liquor tax certificate could not be canceled under the law until a month after its surrender. Ten days before the lapse of that period the new liquor tax certificate was issued to Slattery & Hammond, who applied for the same with due diligence, and the agent of the State, the county treasurer, who issued it, was fully aware of all the facts.

The statute provides that no consents of the owners of neighboring property shall be required where premises were used for trafficking in liquor on March 23, 1896, and that where consents unlimited as to time have once been obtained, no further consents shall be required "so long as such premises shall be continuously occupied for such traffic." (Laws of 1896, chap. 112, § 17, subd. 8, as amd. by Laws of 1897, chap. 312.)

Where, as here, the premises were used for trafficking in liquor on the 23d day of March, 1896, continuous trafficking thereafter is not required by the express language of the statute to relieve the owner from obtaining consents but only by judicial construction.

It is significant, and should be borne in mind in construing this enactment, that the criterion is not whether liquor has been continuously sold on the premises, but whether that is the use to which the premises have been continuously devoted.

The owners of residential property within two hundred feet of premises have no constitutional right to be permitted to determine whether such premises shall be licensed to sell liquor, nor on the other hand has the holder of a liquor tax certificate any constitutional right to continue trafficking in liquor. By a higher license fee and by requiring the consents of two-thirds of such

owners of neighboring property, it was designed to reduce the number of licensed places. The Legislature, however, by expressly dispensing with such consents as to premises then licensed and as to premises thereafter licensed where consents unlimited as to time were once obtained and filed, quite clearly manifested an intention to protect property owners as to investments and expenditures made in good faith in constructing and fitting up premises for saloon purposes.

It would be difficult if not impossible to enunciate a principle in the construction of this statute that would apply to all cases. I think it may be safely stated as a general rule, however, to which there may be exceptions, that this vested privilege and right, annexed by statute to premises used for trafficking in liquor on the 23d day of March, 1896, should and may be continued within the true intent and spirit of the law, until the owner forfeits the right by devoting or consenting or acquiescing in the devotion of the premises to another use, or by some act manifests an intention to suspend or abandon their use for the purpose of trafficking in liquor.

I cannot agree with the holding by implication contained in Justice Mc LENNAN'S opinion, that the tenant by surrendering the certificate may deprive the landlord of this right unless there was an express agreement that trafficking in liquor should not be suspended. I think renting premises for such traffic is sufficient to preserve the right, provided the landlord, upon learning of a suspension of the traffic by the tenant, exercises due diligence in resuming possession and continuing the right.

In the case at bar the premises have not been devoted to any other use and their only occupancy has been for continuing the traffic in liquors. The owners have done no act indicating an intention to abandon or suspend that business. On the contrary, it affirmatively appears that they have at all times intended to exercise the privilege, and they have used reasonable diligence in protecting their interests and preserving this right.

I, therefore, vote for reversal.

SPRING, J. (dissenting): The salient facts in this proceeding are uncontroverted. John C. Hathaway owned the premises in question on March 23, 1896, when the Liquor Tax Law became operative, and they then contained a saloon in which the traffic of liquor was carried on. On April 29, 1899; Mary A. Knights,

who was then the occupant of this saloon, obtained a certificate from the county treasurer authorizing her to continue the traffic, which she did without interruption until January 27, 1900, when she voluntarily surrendered the certificate to obtain the rebate, as it was by its terms effective until the first of May following. Hathaway sold the premises to Slattery & Hammond by deed dated January 6, but delivered January 17, 1900. They expected undoubtedly to use them for a saloon for the sale of liquor. The purchasers informed Mrs. Knights of their purchase, and permitted her to continue her occupancy until March first, which she did. Her tenancy under Hathaway was by a verbal lease, and she paid rent monthly in advance, and, for the month of February she attorned to the new owners. There was no agreement by which her certificate was to be assigned to them. From January twenty-seventh until March first, during her occupancy of said premises, after the surrender of said certificate the traffic in liquor was not carried on at all therein. On February 7, 1900, Slattery & Hammond applied to the county treasurer of said county for a certificate authorizing them to sell liquor in said premises. In their verified application filed for that purpose in response to the question, "Since what date have said premises been occupied continuously for such traffic in liquors?" they answered, "Since 1894 to January 29th, 1900." The application was refused on the ground that said premises had not been "continuously occupied for said traffic" to the date of the application. On February seventeenth another application was presented by these owners, in which they answered the same inquiry as to the continuous sale of liquor by saying, "prior to May 23, 1896," eliminating the portion implying that the traffic in liquor had ceased January 29, 1900. Upon this application a certificate was issued to them permitting them to traffic in liquor in said premises until April thirtieth following. No consent of the owners of adjacent dwellings accompanying said petition was filed with said treasurer. The nearest entrance to said premises is "within two hundred feet, measured in a straight line, of the nearest entrance" to the buildings of the petitioners, each of which is occupied "exclusively as for a dwelling." They commenced this proceeding to secure the revocation and cancellation of said certificate on the ground that said premises had not been occupied continuously for the traffic in liquor, and that the statement to the contrary in said application is false.

Subdivision 8 of section 17 of the Liquor Tax Law (Chap. 112, Laws of 1896, and its various amendments) require the consent in writing, that the traffic in liquor be carried on in the premises, to be executed by the owner or owners of at least two-thirds of the buildings exclusively occupied for dwellings and situated within two hundred feet of said premises. If the liquor traffic was carried on in the premises March 23, 1896, such consent was unnecessary at that time and shall not "be required so long as such premises shall be continuously occupied for such traffic." That is, although the occupant had a clear right to prosecute his business after March 23, 1896, and as long as he did so continuously without obtaining the consent of these nearby owners, if he discontinued the traffic or abandoned the business, its resumption must be preceded by their consent, executed and filed in compliance with the statute. (*People ex rel. Bagley v. Hamilton*, 25 App. Div. 428; *Matter of Klevesahl*, 30 Misc. Rep. 361; *Matter of Bridge*, 36 App. Div. 533.) The length of time of such abandonment is unimportant. (*People ex rel. Sweeney v. Lammerts*, 18 Misc. Rep. 343; *affd.*, 14 App. Div. 628, without an opinion.) The abandonment itself operates as a forfeiture. (*Matter of Lyman*, 34 App. Div. 389.)

In *People ex rel. Sweeney v. Lammerts* (18 Misc. Rep. 343) the premises were occupied by a tenant engaged in the traffic in liquor when the Liquor Tax Law went into effect. He ceased the traffic April second, but resumed it, continuing until June eleventh, when he abandoned both the business and the premises. On the succeeding day, Sweeney leased the premises of the owner for the purpose of conducting the liquor traffic, and at once began fitting it up with that view. On the fifteenth of that month the former tenant applied to the county treasurer for permission to assign his certificate to Sweeney, which was refused, as the consent of the requisite number of owners within two hundred feet had not been filed. On the thirtieth of June the occupant made application for a certificate, which was again refused, and proceedings were instituted to review the determination of the county treasurer. That official was sustained at Special Term, the judge saying in his opinion (at p. 348): "I am constrained to hold, therefore, that, as the business of trafficking in liquors was not continued after the 11th day of June, there was an abandonment of the premises for that purpose, and before the liquor business can again be carried on in these premises, the

party applying for a tax certificate must comply with the provisions of the act by procuring the consent of two-thirds of the owners of buildings occupied exclusively for dwellings, as provided by subdivision 8 of section 17."

In the present case, Mrs. Knights was the only person authorized to carry on this traffic, January 27, 1900. She was in possession of the premises; the rent had been paid in advance, and certainly her tenancy could not be terminated until the first of the following month, if even then. She owned the certificate, and that furnished the only permission to traffic in liquors. It was her property and it had a money value, and she surrendered it to obtain the rebate. No other certificate was issued until February seventeenth, and certainly during that interim no one could lawfully carry on the traffic in the premises. There is no claim that any liquor was sold from the abandonment until the termination of her tenancy, on the first of March following. There were, therefore, both the legal disqualification arising from the lack of the certificate, and the actual abandonment of the traffic. During that period no one else was in possession, and as long as she was the occupant and the holder of the certificate, if she abandoned the traffic, that suspended the business, so that its resumption must be based upon the written consent required by the Liquor Tax Law.

There is no pretense that Mrs. Knights ever agreed to transfer the certificate to these owners. It was personal property and assignable (*Niles v. Mathusa*, 162 N. Y. 546), and they could have protected themselves by an agreement with her to transfer it to them, by complying with section 27 of the Liquor Tax Law.

Matter of Kessler v. Cashin (163 N. Y. 205) is in harmony with this position instead of adverse to it. In that case Cashin was in the occupancy of premises which had been continuously used for the traffic in liquor since the adoption of the Liquor Tax Law. On the 19th of February, 1899, a part of the saloon was destroyed by fire, resulting in a forced suspension of the business. There was no surrender of the certificate, and repairs were commenced immediately, but were not completed for three months. During that time the traffic could not be carried on. As is said by Judge O'BRIEN of the Court of Appeals in his opinion: "The suspension was due entirely to the fact that the place had been wholly or partially destroyed, since there was no intention to abandon the business, but, on the contrary, to resume it as soon as the building

was in a proper condition for that purpose, and it was actually resumed by Cashin under the certificate in question as soon as the place was put in a suitable condition for business. * * * In order to deprive the place of the privilege conferred by the statute, it must appear that there was a real and substantial abandonment of the business by the occupant." In that case there was no voluntary abandonment by the occupant and no intention to suspend his business.

In the present case the only person who had any title to the certificate and who was the sole and lawful occupant of the premises exercised her legal privilege in surrendering her certificate and abandoning the business. The statute is very plain that if the new occupants desired to revive the business after this voluntary discontinuance of it, they must procure the consent required by the statute. The first certificate had spent its force by action of its owner. Their right to engage in the traffic of liquor depended upon a new certificate, and no liquor was sold in the meantime.

Had Mrs. Knights actually agreed to continue the traffic in liquor until March first and then assign the certificate to these owners, they would have been in a measure at her mercy. If the certificate had been canceled for her misconduct while held by her as their tenant, that would have operated to discontinue the traffic. Though the lessors were ignorant of her violation, the effect of a decision annulling the certificate, therefore, would reach them, requiring them when they obtained a new certificate to file the consent pursuant to the statute. As is said in *Matter of Michell* (41 App. Div. 271, 273), in commenting upon a similar provision: "He had placed it in the power of the assignee of the certificate to take it away, and if the assignee exercised that power he must bear the consequences." The import of the prevailing opinion is that a secret agreement between the landlord and his tenant whereby the tenant agrees to continue the traffic of liquor inures to the benefit of the former so that he is relieved from filing the consent of adjacent owners of dwellings with his new application, even though the occupant had absolutely ceased the traffic and surrendered the certificate issued to him. That is, if a tenant who occupies a saloon under a tenancy of five years, surrenders his certificate and discontinues the traffic in liquors and does not engage in it for the balance of his term, because, forsooth, he has violated his private agreement with his landlord, the public

and adjacent owners must suffer for the breach and not the lessor. In the meantime new dwellings may have been erected within the prohibited district by owners unaware of this private agreement and upon the supposition that the consent of two-thirds of the owners must be obtained before liquor can be sold in the premises, and yet all to no purpose, for the tenant has discontinued the traffic in violation of his verbal contract with his lessor. I find no warrant in this law for that construction which gives this extraordinary relief to the owner from the burden cast upon him by the statute because he may have been deceived by his tenant.

An analysis of the facts in this proceeding shows that these owners did not place the slightest reliance upon Mrs. Knights' certificate or her continuance of the liquor business. They acquired title to the premises January seventeenth without making any arrangement with her to surrender possession or to carry on the traffic. They claim that five days after their purchase they advised her of their ownership, and that she desired to continue in possession until March first, and that they complied with her request. She did not agree to retain her title nor did she in terms agree to carry on the liquor traffic. She surrendered her certificate for cancellation January twenty-seventh, before the owners could have obtained possession, for her tenancy under Hathaway was in full life. On February seventh the purchasers applied for a liquor tax certificate. That was an entirely independent application, in no way recognizing any right in Mrs. Knights existing at that time. They stated in their petition that the occupation of said premises for traffic in liquor had terminated January twenty-ninth. They also stated that consents of dwelling owners were unnecessary because they had been filed upon Mrs. Knights' application in May, 1899. They were proceeding upon the assumption that these consents ran along indefinitely. This is further evidenced by the affidavit of Slattery, which states that these consents were all "perpetual in character." They were not paying any attention to the occupancy of Mrs. Knights or the continuance of the traffic by her, but were acting upon the belief that they could rest upon the consents filed with her petition. Again, they sought that their privilege to sell be of the date of February first. If they could depend upon Mrs. Knights' possession, their certificate need not be operative until March 1st. They did not seek even to have it commence from

the date of the surrender of her certificate, though the fact of surrender and its date were known to them. While I find no authority in the statute for post-dating a certificate, yet to be consistent and make an apparent, continuous traffic, we would expect the period of surrender of one certificate and the rights under the new to be simultaneous, if these owners were placing any reliance upon her certificate.

She not only surrendered her certificate but discontinued the traffic, and as Underhill, her saloonkeeper, says: "On January 28, 1900, removed all her unsold stock of liquors and cigars therefrom, and permanently closed up said premises and business," and that said premises, "or any part thereof," were not occupied "for traffic in liquors, or for any other business enterprise," and that said saloon "has been closed ever since said January 27, 1900," and these facts are corroborated by the petition of the relators. The discontinuance of the traffic on January twenty-seventh was found as a fact by the judge at Special Term, and is recited in the order revoking the certificate issued to the defendants. I find nothing in the papers to support the charge either that the surrender of the certificate or that the discontinuance of the traffic was done secretly, although of no importance.

In brief, the case presents this condition of affairs: Mrs. Knights, on January twenty-seventh, was the sole owner of this certificate; no one else had any interest in it whatever. She was in possession, not under the defendants, but by virtue of her tenancy from Hathaway. On that day she voluntarily surrendered the certificate to obtain the rebate to which she alone was entitled, and which she later received. She continued in the occupancy of the premises until March first, but during that entire period no liquor was sold in the premises and no one had any right to engage in that traffic therein. The defendants, under their new light, claim there was no discontinuance, because they understood she was to continue selling liquor. If the effect of the surrender of the certificate and the actual discontinuance of the traffic are to be dependent upon a secret agreement between the occupant and her landlord, then the execution of the law is precarious and uncertain, and it is materially shorn of its efficiency. The certificate is what the statute deals with, not the verbal understanding of the parties. The construction given in the prevailing opinions ignores the occupant and his certificate, and makes the

intention of the owner, who has no right in the certificate, the determining factor.

It is contended that some liquor and the fixtures were in the saloon when the owners went into possession. That fact does not constitute a continuance of the business. (*Matter of Lyman*, 34 App. Div. 389.)

The order should be affirmed, with costs and disbursements to the respondents.

WILLIAMS, J., concurred.

Order reversed, with costs.

Fourth Appellate Department, July, 1900. Reported. 53 App. Div. 649.

In the Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 11,384, Issued to ELM SOCIAL CLUB, Appellant.

This is an appeal from an order revoking and canceling liquor tax certificate for alleged violations of the Liquor Tax Law. The sole question raised by appellant upon the appeal was as to the authority of the State Commissioner of Excise in his official capacity as such, to maintain the proceeding to revoke.

Joseph V. Seaver, attorney for defendant-appellant: Public officers acting under a statutory authority must confine themselves strictly within the powers conferred by the act. (*Palmer v. Plank Road Co.*, 11 N. Y. 376, 385.) The office of State Commissioner of Excise is an office that did not exist at common law, nor is it a constitutional office. It is an office created by chap. 112 of the Laws of 1896. Nowhere in the Liquor Tax Law or in any other statute is the duty enjoined upon the State Commissioner to prosecute proceedings to revoke liquor tax certificates under subdivision 2 of section 28 of the law. The proceeding is essentially a citizen's remedy. (*Matter of Seymour*, 47 App. Div. 320.)

Mead & Stranahan, attorneys for respondent: The proceeding may be instituted by any citizen of the State. The commissioner was a citizen and had the right to maintain this proceeding. This court has twice affirmed the court below in like proceedings where the exact question raised here was involved but not discussed in opinion. (*In re Lyman v. Erie County Athletic Club*, 46 App. Div. 387; *In re Lyman v. Speidel*, 51 App. Div. 52.) The word "as" following name of plaintiff or petitioner and that followed by the title of the office is not conclusive as to way in which the action or proceeding is brought. (*Sheldon, Administrator, &c. v. Hoy*, 11 How. 11; *Bennett v. Whitney*, 94 N. Y. 302.)

Order affirmed with costs.

All concurred.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
August 23, 1900.

In the Matter of the Petition of JOHN Q. A. HENRY to Revoke the
Liquor Tax Certificate of FRANK E. MORAN.

Scott & Mayham, for petitioner.

BISCHOFF, JR., J. In view of the evidence produced for the respondent, I cannot hold that the preponderance of proof is with the petitioner touching the violations charged. There is ample evidence to support the claim that the premises, when exposed to view, were sufficiently exposed, and I find no intrinsic probability which should call for my giving the greater credit to the witnesses for the petitioner upon the direct issue of fact as to the sales of liquor, or the failure to expose the premises during the hours stated in the statute.

Motion denied, with costs.

Supreme Court, Steuben Special Term, August, 1900. Reported.
32 Misc. 439.

Matter of the Application of JUSTICE C. ARNOLD, for a Special Town Meeting in the Town of Prattsburg, Under Section 16 of the Liquor Tax Law.

Liquor Tax Law—Form of ballot for local option.

It is not a valid objection to the legality of the submission of the questions of local option, when clearly distinguished upon a ballot, that the ballot contains constitutional amendments submitted to the people, nor that the local option questions were not numbered 1, 2, 3 and 4, respectively, or that question 4 was not in the words prescribed by the Liquor Tax Law as amended (L. 1897, ch. 312, § 9.)

MOTION for an order to submit the question of local option, under the Liquor Tax Law, to a special town meeting of the town of Prattsburg, N. Y.

James Flaherty, for petitioner.

P. W. Cullinan, for Steuben County Treasurer.

DUNWELL, J. Motion for an order to submit the question of local option under the Liquor Tax Law to a special town meeting of the town of Prattsburg, N. Y., upon the ground that such question was not properly submitted at the biennial town meeting held in connection with the general election November 7, 1899.

It appears that certain proposed amendments to the Constitution, four in number, were submitted at the same time upon the same ballot with the questions relating to local option under the Liquor Tax Law.

The liquor tax questions, four in number, immediately followed the proposed constitutional amendment questions upon the same ballot.

The proposed amendment questions were numbered 1, 2, 3 and 4. The liquor tax questions followed with consecutive numbers, 5, 6, 7 and 8. It is alleged by the petitioner that the placing of the liquor tax questions upon the same ballot with the constitutional questions was improper.

This objection is untenable, as the Election Law expressly pro-

vides that all such questions shall be submitted upon the same ballot. See Election Law of 1896, chap. 909, § 82.

It is further objected that the numbering of the questions 5, 6, 7 and 8, instead of 1, 2, 3 and 4, as they appear in the Liquor Tax Law, is improper.

It would, perhaps, have been more orderly to submit the liquor tax questions under the same numbers under which they appear in the Liquor Tax Law. But, inasmuch as the ballot submitted upon the motion shows that the headings to the several questions were prefixed to each question upon the ballots used by the voters, explaining each question and almost precluding any occasion for referring to them by number, I do not deem the manner of numbering the questions upon the ballot material, and do not consider that the voters could have been confused by reason thereof as charged in the petition.

The form of question 4 of the Liquor Tax Law (appearing as question 8 upon the ballot in question) did not contain the words added to the question by the amendment of 1897, chapter 312, section 9.

The petition alleges that in consequence of the failure to comply with the amendment the propositions were not properly submitted and that the petitioner is entitled to have the questions submitted to a special town meeting as the remedy provided by section 16 of the Liquor Tax Law.

The question upon the ballot as submitted reads:

“ Selling Liquor by Hotel Keepers.

“ Yes —

“ No —

“ Shall any corporation, association, copartnership or person, be authorized to traffic in liquors under subdivision one of section eleven of the Liquor Tax Law, as the keeper of a hotel in the town of Prattsburg? ”

This form of question was in accordance with the statute before the amendment.

The question in the statute as amended reads: “ Selling liquor by hotel keepers only: Shall any corporation, association, copartnership or person be authorized to traffic in liquors under subdivision one of section eleven of the Liquor Tax Law, but only in connection with the business of keeping a hotel in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative? ”

As was said in *People ex rel. Hirsh v. Wood*, 148 N. Y. 147, where the clerk who prepared the official ballot improperly inserted the names of judicial candidates of one party in the local column of another, thus giving to the candidates so favored an important benefit,—“The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them.”

In that case the result of the election was sustained, notwithstanding the clerk's error.

In *People ex rel. Leonard v. Hamilton*, 42 App. Div. 212, it was held that irregularities in the certificate of an election officer can not be worked to defeat the will of the electors and that the intention of the electors is paramount thereto. This principle is conceded by all the cases and writers upon the subject.

It follows in the present case, if the electors have intelligently voted upon the question whether hotels shall be permitted to sell liquors upon the premises under the Liquor Tax Law in the town of Prattsburg their decision should not be disturbed.

The questions, as they appeared upon the ballot, were preceded by the words “Yes” and “No,” thus indicating to the voter that he was at liberty to vote in the affirmative or negative upon the question under consideration (question 8 upon the ballot), however he may have voted upon any preceding question. The language of the body of the question, relating to hotels, upon the ballot used, is clear, and it is difficult to perceive how a voter of common understanding could be misled, or find difficulty in expressing his intention. With either ballot he would achieve the same result by the same vote.

The amendment is explanatory, no doubt, of the seeming inconsistency of first voting “No” upon the general proposition, whether liquors shall be sold to be drunk upon the premises without qualification, and then voting “Yes” in respect to hotels, which are also places where liquors are sold to be drunk upon the premises. The amended form of the question may remove the supposed inconsistency, but it is doubtful if it makes the voter's way more clear in the act of casting his ballot.

I doubt if, in the hands of the voter, the use of the amended ballot makes any practical difference in the result. Keeping in mind that the intention of the voter, as expressed at the ballot-box, is not to be disturbed, except for substantial reasons, and regard-

ing the objections raised as technical only, I am of the opinion that no sufficient reason has been shown why the election already held should be set aside or why a special town meeting should be called to again pass upon these questions.

My attention has been called to the case of *People ex rel. Caffrey v. Mosso*, 30 Misc. Rep. 164, which is contrary to the views here expressed, but with great respect for the authority of that case, still, for the reasons hereinbefore stated, I am constrained to adhere to the foregoing opinion.

It follows that the petition must be dismissed and the motion denied, but because of the conflict of judicial opinion as to effect of the amendment under consideration the denial of the motion is without costs.

Ordered accordingly. _____

Supreme Court, Erie Special Term, September, 1900. Unreported.

PEOPLE ex rel. JOHN B. TAYLOR v. WILLIAM ELY.

Application for peremptory writ of mandamus directed to the County Treasurer of Cattaraugus county requiring him to grant relator's application for a liquor tax certificate upon payment of the fee therefor.

Wentworth & Wentworth, for application.

P. W. Cullinan, opposed.

KENEFICK, J. The biennial town meeting held in Randolph in November, 1899, decreed a no license status for that town. A license status existed at the time of the meeting, and under the liquor tax law continued until the beginning of the next excise year, to wit May 1st, 1900, at which time the status decreed by the November meeting would become effective. (Section 16.)

On February 9th, 1900, the County Judge of Cattaraugus county upon an ex parte application ordered a special town meeting for a resubmission to the voters of the local option questions on the ground that they had not been properly submitted at the

November meeting, and subsequently on April 5th, 1900, denied a motion to vacate that order.

It is urged that this order did not nullify the result of the November meeting. If it did not it is difficult to see what effect is had. If the result of the November meeting was effective notwithstanding the order what need for the order?

It is also urged that the county judge had no power upon an *ex parte* hearing to set aside the result of an election.

A complete answer to this claim is that the Liquor Tax Law grants him such power. The whole question of excise legislation is within the power of the Legislature. They may grant or withhold local option to localities, and having granted it they may prescribe the conditions on which the vote thereon may become effective.

While it would seem proper for a court or judge to require notice to be given to the State Commissioner of Excise, or to the county treasurer of the county, of the application for such an order, it is entirely a matter of discretion under the statute as it now exists.

The status decreed by the November meeting was nullified by the order of the county judge.

For some reason not apparent the special town meeting was not called until May 1st, 1900, the beginning of the excise year. Again the voters of the town decreed a no license status.

On April 10th, 1900, chapter 367 of the Laws of 1900, took effect, which amended section 16 of the Liquor Tax Law so as to provide that the status decreed by a special town meeting "shall take effect at the beginning of the next excise year, that is, on the first day of May following such vote as is provided when a vote is taken at a biennial town meeting."

The status decreed by the special town meeting on May 1st, 1900, did not, therefore, become effective until May 1st, 1901, and as the result of the November meeting was nullified by the order of the county judge the existing license status continues until May 1st, 1901.

This conclusion thwarts the will of the voters of this town twice expressed, and is only reached because a plain reading of the statute compels it.

A peremptory writ of mandamus is granted.

Supreme Court, Niagara Special Term, October, 1900. Reported.
32 Misc. 534.

Matter of the Petition of LOUIS N. LOPER and GEORGE H. BAKER,
to Cancel the Liquor Tax Certificate of SLATTERY and
HAMMOND.

1. Liquor Tax Law—Costs, for making case on appeal, refused where
appeal was heard on certified papers.

Where an appeal from an order cancelling a liquor tax certificate is heard by the Appellate Division on papers which have been stipulated by the attorneys to be copies of the originals on file in the proper clerk's office and no formal case on appeal has been made and duly signed by the proper judge, the party prevailing on the appeal will not be allowed to tax costs for making and serving a case.

2. Same—Revocation of certificate a special proceeding.

Semble, a proceeding to revoke a liquor tax certificate is a special proceeding.

MOTION by the petitioners for a retaxation of costs upon a final order of the Appellate Division, reversing the order of the Special Term, canceling the liquor tax certificate.

Judson & Richardson, for motion.

Richard Crowley, opposed.

KRUSE, J. The Special Term revoked the liquor tax certificate, which is the subject-matter of the controversy in this proceeding, and, upon appeal, the Appellate Division reversed the order, with costs, and thereupon the county clerk of Niagara county taxed costs in favor of the liquor tax certificate holders and against the petitioners. Among other items included in the bill of costs were two items for making and serving a case, one of \$20 and another of \$10, it being claimed that the case contained more than fifty folios, and these two items are the subject of controversy upon this motion, the petitioners contending that these two items have been improperly taxed, and should be stricken from the bill of costs.

It is conceded that the proceeding for the revocation of this liquor tax certificate is a special proceeding. Section 3240 of the

Code of Civil Procedure provides that costs "in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner."

The matter was heard at Special Term, upon the petition, affidavits and other papers, and no oral testimony was taken. The stipulation of the attorneys, which forms a part of the record upon which the appeal was heard and determined at the Appellate Division, states that the petition and other papers which are specifically named in the stipulation "are all true copies of all papers and other records used herein or pertaining hereto, which are in any way material to the issues, on file in the Niagara county clerk's office, and of the whole and every part thereof, and that said papers, together with the affidavit of no opinion and this stipulation, shall constitute the appeal book herein." This stipulation was made under section 3301 of the Code of Civil Procedure, and rule 41 of the General Rules of Practice, which permits such a stipulation to be used in place of the usual certificate of the clerk required for authenticating the copies of the original papers.

No formal case was made and signed by the judge before whom the matter was heard and determined, such as is usual in actions, as is required by sections 997 and 1353 of the Code of Civil Procedure, and the Rules of General Practice. Rules 32, 35, 41. It is contended, however, on behalf of the liquor tax certificate holders, that similar services were rendered in preparing the papers and the record upon the appeal to the Appellate Division to those in making up a formal case, and therefore they are entitled to the same rate of compensation. It is true that but little additional labor would have been required to have made up a formal case, but it was not done, and I do not well see how, under such circumstances, compensation can be allowed therefor.

I do not think the case of *Wood v. Excise Commissioners*, 9 Misc. Rep. 507, is at variance with this view. That case is authority for allowing the same costs in a special proceeding as in actions, instead of motion costs merely. But I do not understand it to be an authority for allowing costs for making a case where the law does not require any case to be made, or it is

waived by the parties, and not insisted upon by the appellate court.

It was held in *Matter of Clarke's Estate*, 15 N. Y. Supp. 867, which was a special proceeding, and where the General Term reversed the order of the Special Term, with costs, that the prevailing party was not entitled to costs for making a case, although it appeared in that case that the matter had been referred to a referee, who had taken proof, which was used at the Special Term and was contained in the record upon which the General Term heard and determined the matter. I do not think that case distinguishable from the matter now being considered.

The motion to retax the costs must, therefore be granted, with \$10 costs of the motion, and the two items for making a case, amounting to \$30, stricken from the bill of costs.

Ordered accordingly. _____

Supreme Court, New York Special Term, October, 1900. Reported.
32 Misc. 621.

Matter of the Petition of HENRY H. LYMAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 10,402, Issued to JULIUS SCHARMANN.

Liquor Tax Law—Proceeding to revoke certificate not stayed because of pending action on bond.

A proceeding, to revoke a liquor tax certificate for sales on Sunday and during prohibited hours, will not be stayed because of the pendency, and until the decision, of an action upon a bond given by the holder of the certificate, although the violations alleged in each case are substantially the same, and this because the two proceedings are distinct and the relief contemplated is not the same in each.

PROCEEDING to revoke and cancel tax certificate.

H. H. Kellogg, for petition.

Page & Eckley (*Alfred R. Page*, of counsel), for defendant.

LAWRENCE, J. This is a proceeding to revoke and cancel a liquor tax certificate pursuant to section 28, subdivision 2, of the

Liquor Tax Law, on the ground of violations of different subdivisions of section 31 thereof, to-wit, Sunday sales and sales during prohibited hours, etc. The attorney for the respondent moves that this proceeding be stayed pending the outcome of an action, which had been brought upon the bond given by the respondent Scharmann, and the Fidelity & Casualty Company of New York, on the ground that, inasmuch as the violations of the Liquor Tax Law, set forth in the complaint upon the bond, are substantially the same violations as those for which the revocation of the certificate is sought, the respondent should be given the benefit of a jury trial. It was held by the Appellate Division of this department in *Lyman v. Shenandoah Social Club*, 39 App. Div. 459, that "The liability of a surety upon a bond, given in pursuance of section 18 of the Liquor Tax Law (Chap. 112, Laws of 1896, as amd. by chap. 312 of the Laws of 1897), is not limited to the civil or criminal penalties prescribed in that act for the violation of its provisions," and that "Upon proof that the premises were disorderly and that liquor was sold thereon Sunday and between one and five A. M. on other days, in violation of the conditions of the instrument, the surety becomes obligated to pay as liquidated damages the penal sum mentioned in the bond, independently of the fact that a judgment for a like amount may have been recovered against the principal in an action for the civil penalties"; that "An action upon such bond is not criminal either in form or substance, but is a civil action upon a contract." In the case of *Matter of Lyman*, 46 App. Div. 387, many of the cases relating to this subject were reviewed by Hardin, P. J. The learned justice says, at page 394, that "Power to revoke certificates granted under the Liquor Tax Law is conferred upon Special Terms of the Supreme Court, or a justice of that court, and it is made the duty of such justice, or of the court to act and to revoke and cancel certificates where the holder has failed to comply, by truthful statements in his application or otherwise, with the provisions of the law. Evidently the Legislature intended the action to be summary and was designed to furnish a ready and quick remedy for failure to comply with the provisions of the law." That decision was affirmed in 163 N. Y. 552. It being evident that the proceeding for the revocation of the license is entirely distinct from the action upon the bond, I see no reason why the motion for a stay should be granted. A motion for a stay of proceedings in an action, on the ground that another suit

is pending, which embraces the same matters, will not be granted where it does not appear that the entire relief demanded and sought in one action could be awarded in the other. See *Sorley v. Brewer*, 18 How. Pr. 509; *Litchfield v. Smith*, 7 Robt. 306; *People v. Northern R. R. Co.*, 53 Barb. 98; *McCarthy v. Peake*, 18 How. Pr. 138. This case will, therefore, take the usual course, and a referee will be appointed to take the proof in support of the application for the revocation of the certificate. Draw order accordingly and settle on notice.

Ordered accordingly. _____

Court of Appeals. Reported. 164 N. Y. 586.

In the Matter of the Petition of GEORGE E. CHASE, Respondent,
to Cancel Liquor Tax Certificate No. 18,745, Granted to
THOMAS A. PEREW, Appellant.

Matter of Chase, 50 App. Div. 622, affirmed.

(Argued October 3, 1900; decided October 26, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 2, 1900, affirming an order of Special Term revoking, canceling and directing the surrender of a liquor tax certificate granted to Thomas A. Perew.

William S. Jackson, for appellant.

W. B. Simson, for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

Second Appellate Department, November, 1900. Reported. 54 App. Div. 602.

NICHOLAS W. NOSTRAND, Appellant, *v.* CHARLES HUGHES,
Respondent.

Lease with an unfilled blank in the clause relating to the use of the demised premises—Effect thereof—It cannot be supplied by proof of an oral agreement.

The existence of a blank, in a lease which provides that the demised premises shall "be occupied—and not otherwise," does not constitute an ambiguity authorizing the admission of parol evidence that when the lessee accepted the lease the lessor verbally promised to sign a consent to allow the premises to be used for the sale of intoxicating liquors.

Semble, that such a lease is complete and effective.

APPEAL by the plaintiff, Nicholas W. Nostrand, from a judgment of the Municipal Court of the city of New York, borough of Queens, second district, in favor of the defendant, rendered on the 1st day of August, 1900, in an action to recover rent.

C. A. S. Van Nostrand, for the appellant.

John J. Trapp, for the respondent.

WOODWARD, J.: This action was brought to recover money alleged to be due under a lease for the months of June and July, 1900, the aggregate amount being eighty dollars. On the 4th day of August, 1898, the defendant entered into a written lease with the plaintiff for the house and store at No. 50 Main street, Flushing, for a term of five years, at an agreed rental of forty dollars per month, which the defendant covenanted to pay monthly in advance. The defendant entered into possession of the premises under the said lease September 1, 1898, and occupied the same up to June 1, 1900. The defendant then moved into a store in the immediate vicinity, and refuses to pay the rent under his written lease on the ground that previous to making and executing the lease of said premises he informed the plaintiff that he desired to use the store for the sale of liquor and the plaintiff verbally promised to sign a consent, which the plaintiff, in May, 1900, refused to do. Upon the trial of the action the lease was introduced in evidence, and the defendant, over the objections and exceptions of the plaintiff, was permitted to introduce parol

evidence of the alleged verbal agreement to sign a consent to the use of the premises for the sale of liquors, on the ground that there was an ambiguity in the written lease. The trial resulted in a judgment in favor of the defendant, and from this judgment appeal comes to this court.

The question material to be considered is raised by the exceptions to the admission of parol evidence. The portion of the written lease which is relied upon to justify the admission of parol evidence is found in the following clause: "That the said party of the first part hath agreed to let, and hereby doth let, to the said party of the second part, and the said party of the second part hath agreed to take, and hereby doth take, from the said party of the first part the premises No. 50 Main street, Flushing, borough of Queens, city of New York, for the term of five years, to commence on the first day of September, 1898, and to end on the first day of September, 1903, to be occupied ——— and not otherwise, and the said party of the second party hereby covenant and agree to pay," etc. The learned court held that this constituted an ambiguity which entitled the defendant to show that the blank should have been filled, or at least that there was a verbal agreement such as the defendant alleges, and admitted the evidence offered. This was clearly error; it permitted the defendant to introduce parol evidence to vary the terms of a written agreement. In the case of *Vandervoort v. Dewey*, (42 Hun, 68), where a written lease provided that the party of the first part should have the "right to terminate this lease at any time after the decease of said Jedediah Dewey, at any time when the said party of the first part has an opportunity of selling the premises, of which said house and lot or garden spot are a part, by paying to said Mary D. S. Dewey the sum of ——— dollars," evidence was offered to show that this blank was intended to be filled by a mere nominal sum, but the evidence was rejected. On appeal the court said: "If the question was one of construction, as to the meaning of the contract, the language being such as to be capable of two or more constructions, parol evidence might be competent, but in the contract under consideration there is nothing in the provisions of the contract that gives us the least intimation as to the number of dollars that it was intended to insert in the contract, and it is, consequently, not a question of construction, but an omission which can only be supplied by the court making for the parties a contract which the parties have

failed to make for themselves. This the courts have no power to do. It consequently follows that the offer to give parol evidence by the plaintiff's counsel was properly excluded by the Trial Court." (See *Eaton v. Wilcox*, 42 Hun, 61, 66.)

The defendant asks, in effect, that the court shall read into this contract a covenant on the part of the plaintiff to sign the consent required by subdivision 6 of section 17 of the Liquor Tax Law, which would make him liable to an action for civil damages for an abuse of the provisions of the law by the defendant or his tenant, under section 39. As the parties have not made such a contract for themselves, and there is no consideration for the alleged verbal agreement, the judgment appealed from should be reversed. The contract is complete and effective as it stands; the defendant may use the building for any lawful purpose within the provisions of the law, but he cannot compel the plaintiff to sign a consent, entailing new liabilities, and which were not within the contemplation of the parties at the time of entering into the written agreement, which must be deemed to have merged all previous conversations in reference to the matters involved in the contract. (*Hull v. Barth*, 48 App. Div. 590.)

The judgment appealed from should be reversed, with costs.

All concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

Fourth Appellate Department, September, 1900. Reported. 54 App. Div. 617.

In the Matter of the Petition of JAMES HAWKINS, Respondent,
for an Order Revoking and Cancelling Liquor Tax Certificate
No. 12,271, issued to THIEL BROS., &C., appellants.

Order affirmed, with costs. All concurred.

County Court, Cayuga County, December, 1900. Unreported.

In the Matter of Application of EDWIN H. ADRIANCE to Revoke
the Liquor Tax Certificate of WILLIAM G. RAMAGE.

F. D. Wright, for petitioner.

F. M. Leary, for respondent.

UNDERWOOD, Co. J.: It is contended on the part of the petitioner that the application presented to the county treasurer and upon which the liquor tax certificate was issued, contained false statements for which it should be revoked.

The application states that there are but nine buildings used exclusively as dwellings within two hundred feet of the entrance of the place where liquor is to be sold. And in describing these buildings the application refers to numbers 7 and 9 Paddock Block as being two of the buildings included to make up the total of nine.

It is claimed by petitioner that the Paddock Block is to be treated as if it were six distinct buildings instead of but two. This block is comprised of two portions, one of brick and the other of wood, adjoining each other, and both facing Franklin street, the entire property being owned by one person who rented various portions of the block to different individuals as flats for residential purposes.

The brick building contained two flats on the ground floor, each with its own separate street entrance, two flats on the second floor, each also having its separate street entrance, and two flats on the third floor having a street entrance in common, and which by means of a common staircase led to these two flats.

Each of these six flats was separate and distinct from the others and there was no communication between any of them without passing outdoors, except that between the two flats on the third floor it was possible to pass from one to the other across the landing at the head of the stairs, and there was also a door connecting the two flats, which the tenants sometimes made use of although against the landlord's direction.

The entrance to the easterly flat on the second floor of the brick building was through a street door and stairway in the adjoining wooden building—there being an opening in the wall of the brick building from this passage or entrance into the flat.

This street entrance and the street entrances of all the other flats referred to were within two hundred feet of the entrance to the defendant's saloon.

From the plans submitted and the description of this building given by the witnesses, it is evident that the brick portion of this block is really but one building. While the flats are disconnected from each other, as stated, there are no interior partitions carried up from cellar to roof dividing an entire portion of the block from another. An attempt to convey any distinct portion of the block would involve a reconstruction of the interior.

So far as this block is concerned I think, therefore, that the application conformed to the facts.

It is next claimed that the application is false in representing that the applicant had the consent of Mrs. Maria L. Young, who owned two of the nine houses referred to in the application.

Attached to the application, which appears to have been verified on the 13th day of July, 1900, appears a consent in the form required by this statute signed and acknowledged by Maria L. Young on said 13th day of July.

This application was not presented to the county treasurer until October 1, 1900. Meanwhile and on July 21, 1900, Mrs. Young caused to be served on defendant and also on the county treasurer a notice in writing signed and acknowledged by her, that she revoked and recalled the consent theretofore given by her.

The question here presented is whether she could revoke her consent once given. It does not appear that any consideration was paid Mrs. Young for her consent, and I am of the opinion that she could revoke her consent at any time before it was presented to and acted upon by the county treasurer.

No case is cited where this precise question is passed upon with reference to the liquor tax law, but, under the provisions of the town bonding acts formerly in force in this State, it was requisite that the consents in writing of a majority of the taxpayers to the proposed bonding should be obtained.

The fact that such majority had consented was to be determined in some cases by the county judge—in other cases by the assessors.

Under these statutes it is well settled that the taxpayers might revoke or withdraw a consent, at any time prior to the determination by the county judge or assessors, as the case might be. *People ex rel. Irwin v. Sawyer*, 52 N. Y. 296; *People ex rel. Yawger v. Allen*, 52 N. Y. 541.

These cases seem to me decisive of the question here presented.

And I, therefore, hold and decide that Mrs. Young's consent was revoked and that, in fact, when the application was filed the applicant had the consent of the owners of but four of the eight buildings occupied exclusively as dwellings within the prescribed distance.

While his application was true at the time he swore to it, on the 13th day of July, it did not disclose the true condition of things on the day when the application was presented and the certificate issued.

It seems to me that the presentation to the county treasurer of the sworn application—the request that thereupon he issue the tax certificate necessarily imply and involve a representation that the facts, as asserted in the application then exist. If this is not so, then a liquor tax certificate might be obtained on an application and consents six months or a year old, although several new houses had meantime been built in the vicinity, the owners of which would not consent, and without whose consent, the requisite two-thirds would be lacking.

For the reasons stated the prayer of the petition is granted with costs.

Supreme Court, New York Special Term. December, 1900. Unreported.

HENRY H. LYMAN *v.* ADOLPH RUEHL, et al.

Mead & Stranahan, for plaintiff.

David Hershfield, for Ruehl.

Boardman, Platt & Soley, for F. & D. Co.

GILDERSLEEVE, J. Upon the trial of this action there was no appearance on behalf of the defendant The Fidelity and Deposit Company of Maryland. When I prepared the memorandum which was published in the "Law Journal" of June 16, 1900, I had no briefs before me, and overlooked section 16 of the National Bankruptcy Act of 1898, which provides that "The liability of a person who is a co-debtor with, or a guarantor, or in

any manner a surety for the bankrupt, shall not be altered by the discharge of said bankrupt." Within a day or two after the publication of the memorandum, and before directing an entry of judgment dismissing plaintiff's complaint as to the defendant Ruehl, my attention was called to the above provision of the National Bankrupt Act. When the findings were presented by the attorney for defendant Ruehl I was mindful of the error I had committed in stating in said memorandum, "It seems to me if the principal is not liable the surety is not liable * * * and that the complaint must be dismissed as to the surety also," and was careful to see, before signing the findings, that they provided for a dismissal of the complaint as to the defendant Ruehl only. It did not occur to me that the surety company, upon the memorandum, might apply to the clerk for a similar judgment. Although the surety company did not appear at the trial, I apprehended that an application similar to the one made in behalf of Ruehl might be made by its attorneys, and that I would then have an opportunity of directing attention to the error I had committed in the memorandum. I never signed any other conclusion of law than the one which directed that the defendant Ruehl was entitled to a dismissal of the plaintiff's complaint as to said defendant. I settled and ordered on file the case and exceptions, on August 27th last, without examination, on the stipulation of the attorneys that the book was correct, and without identifying the case as the one having the particular history above set forth. Until my attention was called to the previous settlement of the case and exceptions I believed that the application made on November 13th to settle the case and order it on file was the first application to that end. On the date last named, remembering the history of the case, I examined it to see that judgment had been entered in favor of defendant Ruehl only, with the result that the case was found to contain a judgment in favor of the surety company as well. Inasmuch as I had never directed any such judgment, I declined to settle and order on file the case as presented.

An order should be made vacating the judgment herein in favor of The Fidelity and Deposit Company of Maryland, and directing a judgment against said company for the penalty of the bond, to wit: sixteen hundred dollars and costs.

As to the costs hereinbefore granted in favor of defendant Ruehl, those costs were allowed on the theory that both defend-

ants were entitled to judgment. But as only one of the two defendants is entitled to judgment the rule of costs is different. Section 3229 of the Code provides that where plaintiff is entitled to costs against one or more defendants, but not against all of them, none of the defendants are entitled to costs of course, and that in such case costs may be awarded, in the discretion of the court to any defendant against whom the plaintiff is not entitled to costs, "where he did not unite in an answer, and was not united in interest with a defendant against whom the plaintiff is entitled to costs." In the case at bar the defendants were united in interest, although they put in separate answers, while the plaintiff is entitled to costs against one of the defendants. In such case the defendant Ruehl cannot have costs in his favor. (See *Churchill v. Wagner*, 23 Misc. 597; *Frazer v. Hunt*, 18 Weekly Digest, 390; *Allis v. Wheeler*, 56 N. Y. 50.)

To the extent above indicated the motion herein is granted, without costs.

Settle order on notice.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
December 19, 1900.

In the Matter of the Application of HENRY H. LYMAN to Revoke
the Liquor Tax Certificate of REYNOLDS BROTHERS.

FITZGERALD, J. By exact measurement it was testified to before the referee that the distance from the middle of the door of the school nearest to Second avenue to the center of the door of respondents' saloon on Twenty-third street was 171 feet. It is conceded that in the application made for a liquor tax certificate the applicants stated that the traffic was not intended to be carried on "in a building on the same street with, and within 200 feet of, a building used exclusively as a schoolhouse." This statement was, under the statute, a necessary averment to authorize a consideration of the application. (Sec. 17, subdiv. 5 of chap 112, Laws of 1896.) It was material and it was false. Petitioner is, therefore entitled to an order revoking the certificate. (*People ex rel. Macy & Co. v. Murray*, 5 App. Div. 66.)

Settle order on notice.

Supreme Court, Westchester Special Term, December 1900. Unreported.

In the Matter of the Petition of ELIZA MOULTON to Revoke the
Liquor Tax Certificate of PASQUALE ACCONCIA.

Motion for a stay pending appeal.

Alfred R. Page, for motion.

Lincoln G. Backus, opposed.

W. M. SMITH, J.: I can not concur with the decisions which hold that a stay may not be granted in these proceedings upon an appeal to the Appellate Division.

Motion granted on condition that the appeal be argued at the January term, and that security be given for the costs and disbursements of appeal.

Supreme Court, Suffolk Special Term, December, 1900. Unreported.

PEOPLE ex rel. CHARLES C. WRIGHT v. HENRY H. LYMAN.

Charles R. Lyon, for plaintiff.

P. W. Cullinan, for defendant.

W. M. SMITH, J.: It is apparent that the application for the writ of alternative mandamus herein was based upon the provisions of section 25 of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897. That section was again amended by chapter 367 of the Laws of 1900, and the provisions thereof for the payment of outstanding receipts issued for liquor tax certificates theretofore surrendered and cancelled, and for proof to be submitted to the State Commissioner of Excise authorizing such payment were repealed. The effect of the amendment was to deprive the relator of his remedy under that section. He contends, however, that the provisions of 25a enacted by said chapter 367 of the Laws of 1900, entitled him to relief. I

think it is a sufficient answer to this contention that the application for the writ was not based upon the provisions of 25a and that the requirements of that section were not complied with. It is not necessary to decide whether the relator is deprived of all relief by the last amendment of section 25. I decide simply that upon this application he is deprived of the remedy he seeks by that amendment.

The writ must be dismissed but without costs, because the proceedings were commenced before the amendment was made.

Supreme Court, New York Special Term, December, 1900. Reported.
33 Misc. 243.

THE PEOPLE ex rel. CASSIUS M. LAWTON, Relator, v. HENRY H. LYMAN, as State Commissioner of Excise, et al., Respondents.

Liquor Tax Law—False statement of a convicted felon, that he is not within the prohibited class, makes his liquor tax certificate void, unassignable, and not entitled to rebate.

A person who pleaded guilty to receiving stolen goods, but as to whom sentence was suspended, must be deemed to have been "convicted of a felony" within the meaning of the Liquor Tax Law (Laws of 1896, chap. 112, § 23), and therefore where, in order subsequently to procure a liquor tax certificate, he swears that he is not within any of the classes prohibited by said section 23 from trafficking in liquors, the certificate issued to him, constituting a mere receipt for the tax, is void *ab initio*, can not be assigned and does not entitle a *mesne* assignee to surrender it and obtain a rebate for the unexpired term—and this although no steps have ever been taken to cancel the certificate or to recover the statutory penalties, and although more than thirty days have elapsed since the certificate was surrendered.

Motion for a peremptory writ of mandamus.

Page & Eckley, for relator.

Royal R. Scott, for respondent Henry H. Lyman.

H. H. Kellogg, for respondent Geo. Hilliard.

FREEDMAN, J.: This is a motion for a peremptory writ of mandamus, directing the State Commissioner of Excise to prepare

and transmit to the special deputy commissioner two orders for the payment of the rebate claimed to be due on liquor tax certificate No. 13,977, surrendered by the relator as assignee of one Charles A. Niven, and directing the special deputy commissioner to pay the amount covered by the orders.

The following facts are undisputed: On or about the 22d day of June, 1900, on application of one William J. Gilmartin, liquor tax certificate No. 13,977 was issued for the traffic in liquors at No. 209 West One Hundred and Twenty-fifth street, in the city of New York, under subdivision 1 of section 2 of the Liquor Tax Law.

On or about the 2d of July, 1900, William J. Gilmartin assigned such tax certificate to one Charles A. Niven, and Niven presented such certificate, with the petition for the transfer of the same together with a new application and bond in form under the provisions of sections 17 and 18 of the Liquor Tax Law, to George Hilliard, as special deputy commissioner of excise for the boroughs of Manhattan and The Bronx, and the said Hilliard indorsed the usual consent for such transfer, and Niven paid the fee of ten dollars, as provided by section 27 of the Liquor Tax Law. Thereafter the said Niven transferred and set over to the relator, all of his right, title and interest in and to the rebate for the unearned portion of said liquor tax certificate, and authorized the special deputy commissioner of excise, or other proper officer, in the event of the surrender or cancellation at any time of said certificate, to pay over to said relator the amount of the rebate for the unexpired term thereof, and authorized the relator, or his attorney, to surrender said certificate for cancellation, and to execute, acknowledge and deliver all papers that might be necessary for the purpose of effecting such surrender.

On the 5th day of July, 1900, Niven voluntarily ceased to traffic in liquor under the said certificate, and it is conceded that, at that time, no prosecution or action was pending against him on account of any violation of the Liquor Tax Law.

On the date last mentioned, the certificate and a duly verified petition, setting forth all the facts required to be shown on such application, and the assignment and power of attorney hereinbefore referred to were presented to the special tax commissioner of excise, and payment of the said rebate to the relator was demanded. No proceeding has ever been instituted for the cancellation of such certificate, nor has any action been commenced for any of the penalties imposed by the Liquor Tax Law, and more

than thirty days have elapsed since the surrender of such certificate.

The State Commissioner of Excise has refused to prepare two orders for the payment of such rebate, as required by section 25 of the Liquor Tax Law, and the special deputy commissioner of excise has failed to deliver to the relator said orders, the reason being given therefor that William J. Gilmartin, the person to whom the certificate was issued, was tried and found guilty of receiving stolen goods, to the amount of \$1,000, in the Court of General Sessions, held in and for the county of New York, on the 6th day of May, 1890, and that sentence was suspended at the time.

The State Commissioner of Excise, in opposition to the motion, bases his refusal to sign the necessary orders for the payment of the rebate upon two grounds.

1. That Gilmartin comes within the class prohibited from trafficking in liquors by section 23, subdivision 1 of the Liquor Tax Law, by reason of his having been convicted of a felony, and that for that reason he acquired no rights under the tax certificate obtained by him which he could assign; and

2. That the alleged transfer of the tax certificate from Gilmartin to Niven was not *bona fide* or for value.

In the application made by Gilmartin, for the purpose of obtaining the liquor tax certificate in question, he swore that he was not within any of the prohibited classes mentioned in section 23 of the Liquor Tax Law, or in other words, that he had never been convicted of a felony.

In the case of *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367, it was held by the Court of Appeals that the Liquor Tax Law (Laws of 1896, chap. 112) is not a "tax law" in the proper sense, as it does not have for its primary purpose the raising of revenue for the support of the government; but that it is a law enacted under the police power, the exactions of which, although denominated taxes, are imposed for the primary purpose of regulating and controlling the liquor traffic, and that as such it is a general and constitutional State excise act. That being so, the courts have nothing to do with the policy or wisdom of the act, but must enforce it as they find it. Turning then to the act itself, including the amendments passed since the year 1896, it will be found upon a full examination of all of its provisions, that before the traffic in liquor becomes lawful under the act, a liquor tax certificate

authorizing such traffic must be obtained and posted, pursuant to section 21, but that the mere payment of the excise tax, of itself, affords no protection. *Scalzo v. Sackett*, 30 Misc. Rep. 543.

A liquor tax certificate is merely a receipt for money paid, and its real import is only that of a voucher for the money paid for the excise tax, because the right to engage in the traffic is derivable, not from the certificate, but from the statute, and from the statements made in the application upon which the certificate is issued. *Niles v. Mathusa*, 162 N. Y. 546; affg. 20 App. Div. 483; affg. 19 Misc. Rep. 96; *Matter of Barnard*, 48 App. Div. 423; *Lynan v. Swartz*, 41 id. 624.

The procurement of the certificate depends not upon the favorable exercise of any officer's discretion, but upon the applicant's *prima facie* legal right to traffic in liquors as evidenced by the specifications of the application. If the application is correct in form and does not show on the face thereof that the applicant is prohibited from trafficking in liquor, under the subdivision of section 11 under which he applies, or at the place where the traffic is to be carried on, a liquor tax certificate must be issued thereon, pursuant to section 19. Such certificate is issued upon the applicant's representations that the statements made in such application are true. *Matter of Bridge*, 36 App. Div. 533; affg. 25 Misc. Rep. 213; *Matter of Harper*, 30 id. 663; *Matter of Tonatio*, 49 App. Div. 84.

And if any material statement so made is false, and the applicant is not entitled to traffic in liquor as specified in the application, the issuance of the certificate does not, as already shown make the traffic in liquor thereunder lawful.

Nor is it material whether the applicant intended to deceive the officer who issued the certificate or not, for his good faith avails him nothing if his statement is, in fact, untrue. *Matter of Fall*, 26 Misc. Rep. 611; affd., without opinion, 39 App. Div. 671; *Matter of Harper*, 30 Misc. Rep. 663.

The policy of the act throughout is to make everything depend upon the truth of the statement of the applicant contained in the required application, and to punish him in case he makes a false statement. The making of a false statement is of itself a crime punishable under subdivision 2 of section 34. As a further but civil penalty, the liquor tax certificate issued upon the application, containing a false statement, may be revoked and canceled in a proceeding instituted under subdivision 2 of section 28.

The policy referred to has even been carried into the provision of the statute which authorizes the holder of a liquor tax certificate to surrender the same and to obtain a certain rebate. Section 25 of the act provides that "If a person holding a liquor tax certificate and authorized to sell liquors under the provisions of this act * * * cease to traffic," he may surrender the certificate and obtain the rebate.

Thus two things must concur; first, the person ceasing to traffic and applying for the rebate must hold a certificate and surrender it, and, second, he must be authorized to sell liquors under the provisions of the act, which means independently of the certificate, because the certificate, as already shown, is only a voucher for the money paid. The consequence is that if the applicant for the rebate, though holding and surrendering a certificate, belonged to the prohibited class defined by the statute when he obtained it, the certificate at all times was null and void and of no legal effect. That being so, even an assignee for value of such a certificate acquires no rights thereunder. The limitation or forfeiture of the rights of a certificate holder, in a liquor tax certificate, equally affects the rights of his assignees who take it subject to the conditions and restrictions with which the holding of the same by the assignor was vested. *People ex rel. Miller v. Lyman*, 156 N. Y. 407; affg. 27 App. Div. 527; *Matter of Bradley*, 22 Misc. Rep. 301; *Matter of Lyman*, 26 id. 300; *Matter of Michell*, 41 App. Div. 271.

For the reasons already stated it is not necessary to determine whether, in the case at bar, the alleged transfer of the certificate from Gilmartin to Niven was, or was not, *bona fide*, or for value, and the only remaining question is whether or not Gilmartin, on obtaining the certificate, made a material false statement in his application. He then and there swore that he was not within any of the prohibited classes mentioned in section 23 of the Liquor Tax Law. As a matter of fact, it now appears that he had been indicted as a receiver of stolen goods, that he had pleaded guilty to such charge, and that his sentence had been suspended. If these facts amount to a conviction, he clearly fell within the prohibited class, for section 23 of the Liquor Tax Law expressly provides that no person convicted of a felony shall be authorized to sell liquors.

The relator strenuously contends that a plea of guilty to an

indictment followed by a suspension of sentence is not equivalent to a conviction.

I have carefully examined the authorities cited by the counsel for the relator in his brief upon this point, and am satisfied that they do not sustain his position. "When it is said there has been a 'conviction,' the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned." 7 Am. & Eng. Ency. of Law (2d ed.), 497.

"Conviction may accrue in two ways, either by his confessing the offense and pleading guilty or by his being found so by the verdict of his country." 4 Black. Com. 362.

In *People v. Goldstein*, 32 Cal. 432, it was held that a plea of guilty, upon which no judgment was given, was nevertheless a conviction.

Even in the case mainly relied upon by the relator, Mr. Justice Gray says: "When the word 'conviction' is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; but the meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict rendered against him by the jury, which ascertains and publishes the fact of his guilt: while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the facts thus ascertained." *Commonwealth v. Lockwood*, 109 Mass. 325. See also, *Matter of Friedrich*, 51 Fed. Repr. 749.

In determining the strength of the relator's position, the intent of the statute must also be taken into consideration.

The statute was intended to safeguard by law a traffic claimed to be conducive to pauperism and crime, to place it, so far as possible, in the hands of persons having, at least, a semblance of respectability, and free from the taint of criminality, and to control it by imposing severe penalties for violations of its provisions. In such a case I do not feel warranted in giving to the word "convicted" an interpretation or construction which is not usually accorded to it.

Under the circumstances disclosed the conclusion is unavoidable that Gilmartin, a confessed felon with the sentence of the

court suspended, who stood excluded from trafficking in liquors, by the express prohibition of the statute, and who obtained his liquor tax certificate by means of a false statement as to a material fact, is not entitled, either in person or by his assignees, to recover from the State the rebate, or other relief, asked for on this application.

The motion must be denied, with costs.

Motion denied, with costs.

Supreme Court, New York Special Term, December, 1900. Reported.
33 Misc. 349.

HENRY H. LYMAN, Plaintiff, *v.* JOHN W. MURPHY, Defendant.

Liquor Tax Law—If consents of neighboring property-owners are insufficient in number, good faith, in believing them sufficient, can not prevent revocation—Costs denied.

Where an applicant for a liquor tax certificate has failed to procure the requisite number of consents to such traffic from the owners of property situate within two hundred feet of the nearest entrance to his proposed place, the facts, that he in good faith believed that he had procured a sufficient number of consents, that he had employed a competent agent to secure such consents, and that those which were lacking had since been supplied, can not prevent the revocation of the certificate. The court, however, excused him from costs.

APPLICATION by the State Commissioner of Excise for an order revoking a liquor tax certificate.

H. H. Kellogg, for plaintiff.

Page & Eckley, for defendant.

ANDREWS, G. P., J. This is an application by the State Commissioner of Excise for an order revoking a liquor tax certificate which was issued April 25, 1900, by the special deputy commissioner of excise for the boroughs of Manhattan and The Bronx to one John W. Murphy. The application is made on two grounds: (1) That the consents required by section 17 of the Liquor Tax

Law were not filed; and (2) that liquor was sold in Murphy's place on Sunday. It appears by the papers that it was necessary to obtain the consents of the owners of twelve pieces of property which were within two hundred feet of the nearest entrance to Murphy's premises. For the purpose of procuring such consents Murphy employed one Davis, who is an expert in excise matters, having been for two years auditor of the State Excise Department and thereafter manager of the excise department of bond companies. Davis procured consents signed by all persons whom he believed to be the owners of such properties, and those consents were duly filed, and the liquor tax certificate was thereupon issued to Murphy. It now appears, however, that two of the eight consents which it was necessary to obtain under the statute were signed by persons who were not the owners of the properties for which such consents were given, and who were not authorized by the owners to give the same. One of these two was signed by Louise Willmer, who was not the owner of the premises No. 224 East One Hundred and Twenty-eighth street, or the agent of the owner, but was merely lessee of the premises, and who, as such lessee, had no authority to sign such consent. The other of the two invalid consents was signed by J. William Keiser, who was stated upon the consent to be the "duly authorized agent for the Kane estate, Nos. 206 and 232 East One Hundred and Twenty-eighth street." It appears that those premises were not owned by the Kane estate, but by one Schuetze. Keiser was the agent of the owner, but was only authorized to rent the place, collect the rents and make repairs, and had no authority to give such consent. Since this proceeding was commenced the real owners of the premises for which Mrs. Willmer and Keiser gave such consents have executed written consents which were in the form required by the statute. This matter was sent to a referee, who took proofs and reported the same to the court, and the motion to vacate the tax certificate is made upon such report. The opposition to the granting of the certificate is made upon the grounds: (1) That Murphy acted in perfect good faith and employed a competent person, who obtained what he believed to be the requisite number of valid consents; and (2) that the owners of the premises of which valid consents were not obtained have now executed the proper consents. The difficulty about these defenses is that it has been held that, in the matter of procuring and filing consents, the question of the good faith of the

applicant for a liquor tax certificate is not involved; that the law requires a certain number of consents; that he must procure and file the same at his peril, and, if he does not do so, the fact that he acted in good faith is no defense or protection. It has also been held that the requisite number of consents must be filed at the time the application for the liquor tax certificate is made, and that, if they are not procured and filed at that time, consents subsequently made cannot be considered upon an application of this kind. I am, therefore, constrained, by repeated decisions heretofore made, to grant the application to cancel the liquor tax certificate; but, as it is apparent that Murphy acted in good faith, and that it was not his fault that the consents were not procured and filed, and as the charge of selling liquor on Sunday is not established by a preponderance of evidence, and as I think that the cancellation of his certificate under these circumstances is a penalty sufficiently severe, costs will not be allowed against him.

Application granted, without costs.

Supreme Court, New York Trial Term, December, 1900. Reported.
33 Misc. 409.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Plaintiff, *v.* MARGARET A. OUSSANI, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Defendants.

Liquor Tax Law—Purchases by special agents, after prohibited hours, does not estop the State from recovering on the bond.

A recovery upon a bond given by a liquor tax certificate holder is not invalidated by the fact that the testimony convicting her of a violation of the Liquor Tax Law was that of special agents who, by direction of the State Excise Department, lawfully entered her place to investigate and subsequently, during prohibited hours, bought liquors there in the same manner as ordinary customers, without practicing coercion, misrepresentation, fraud or deceit.

If the purchasing of liquors was beyond their instructions, such purchases were their own acts and can not estop the State from complaint or recovery.

MOTION for a new trial on the minutes.

Royal R. Scott (Mead & Stranahan, of counsel), for plaintiff.

Charles G. F. Wahle, for defendant Oussani.

Charles C. Nadal, for Fidelity and Casualty Company.

BLANCHARD, J.: This is a motion for a new trial on the minutes. The action was brought by Henry H. Lyman, as State Commissioner of Excise of the State of New York, against Margaret A. Oussani and The Fidelity & Casualty Company of New York, to recover a penalty of a bond given in pursuance of the Liquor Tax Law. It appears that, on or about the 10th day of April, 1899, the defendant Oussani applied to the deputy commissioner of excise for the boroughs of Manhattan and The Bronx for a liquor tax certificate to traffic in liquor at Nos. 32 and 34 West Twenty-ninth street, in Manhattan borough, New York city. Before granting the certificate, the deputy commissioner exacted the bond required by law. Thereupon these defendants, the said Oussani, as principal, and the said company as surety, made and delivered to him their bond in the penal sum of \$1,600, conditioned in part that the principal, the said Oussani, "will not violate any of the provisions of the Liquor Tax Law, or any act amendatory thereof or supplementary thereto, and the said principal will pay all fines and penalties incurred or imposed for violation of the Liquor Tax Law, and any judgment or judgments recovered or entered against the said principal for or on account of such violation of said law, together with all costs taxed or allowed in any action or proceeding brought or instituted under the provisions of said Liquor Tax Law." Under the certificate thus issued, the defendant Oussani was not permitted to sell liquor between the hours of one and five o'clock in the morning, and it was alleged that she did sell or permit it to be sold between those hours under such certificate, and thereby violated one of the provisions of the Liquor Tax Law and the terms of the bond in question. Other violations of the law were alleged or suggested, and some testimony was received concerning them, but they were finally taken from the consideration of the jury, and the single question of fact submitted to the jury was whether or not the defendant Oussani, her servants or agents, sold liquor at Nos. 32 and 34 West Twenty-ninth street, between the hours of one and five o'clock in the morning of February 22, or February

27, 1900. The jury brought in a verdict in favor of plaintiff for \$1,670.93. It appears from the evidence in the case that the persons to whom the said Margaret A. Oussani, the principal in the bond, sold the liquor in violation of the Liquor Tax Law, were the duly appointed special agents of the Excise Department of the State, and that they went to the place in question by the direction of the department, and remained there until after one o'clock. They asked the waiters in attendance, who were employees of the principal in the bond, for liquor of various kinds. The waiters served the liquors thus ordered and the special agents paid for them, and the money used for that purpose was reimbursed by the department to the agents as an authorized expense. In going to the defendant Oussani's place on the night in question, these agents acted in pursuance and under the instructions of the Excise Department of the State.

At the close of the plaintiff's case, the learned counsel for the defendants moved the dismissal of the complaint on three grounds, two of which were finally resolved in favor of the defendants, and decision was reserved on the third. It is as follows: "As to the allegation that the defendant Oussani was guilty of selling liquor after one o'clock A. M. on the 22d or 27th of February, 1900, on the ground that the sales of liquor alleged to have been made on the said days were invited, procured and induced to be made by the special agents and representatives of the plaintiff in this action at the instance, instruction and request of the said plaintiff." No case in this State, decisive of the precise point here involved, has been brought to my attention, nor have I been able to find one, except the case of *Commissioners of Excise v. Backus*, 29 How. Pr. 33, which is much in point. That was an action to recover the penalty for a violation of the Excise Law of 1857, and it was held that the employment of paid informers in detecting such violation did not prevent a recovery. In *People v. Smith*, 28 Hun, 626, it was held, however, that the purchaser of liquor was not an accomplice of the seller within the meaning of the criminal law. In Rhode Island, the principal and his sureties were held liable on their bond for unlawfully selling liquor on Sunday. (See *Tripp v. Flanigan*, 10 R. I. 128.)

On the other hand, in the case of *Mayor v. Dickerson*, 45 N. J. Law, 38, the action was on the city treasurer's bond. The plea of the sureties was that the plaintiff "permitted, encouraged, induced, and was privy to the alleged breach." The city

demurred to the pleadings, and it was held that the plea was good, as "It alleges in substance that the obligees in the bond intentionally brought about the breach now complained of. They must therefore be estopped from complaint."

These decisions are not authoritative, one way or the other, and we must look to the law itself and construe its provisions. By virtue of the provisions of section 10, the special agents of the plaintiff were authorized to investigate all matters in relation to the compliance with law by persons engaged in the traffic in liquor, and to investigate any other matter in connection with the sale of liquor, and section 38 of the act provides that any officer who shall neglect or refuse to perform his duty under the provisions of the act shall be liable to a penalty of \$500 for each and every offense. The methods to be adopted in the course of such investigation are not specially defined or limited by the statute, and it was doubtless the intention of the Legislature to leave to the State officials making such investigations the largest discretion and latitude in respect to the methods to be adopted by them therein, provided, of course, that such methods do not interfere with any of the rights of the parties whose acts are under investigation.

It, therefore, seems clear that, in the course of their investigation of the conduct of the defendant Oussani in her business of selling liquor, it was necessary and proper for the special agents of the plaintiff to ascertain what was the particular kind of liquor which she was selling during the prohibited hours, and for that purpose to seek to be served with the liquor which she was offering for sale.

The evidence does not show that those agents offered any special invitation or inducement to the defendant to serve such liquor to them. The transaction was the ordinary one of ordering specified liquors in a liquor saloon, and paying the usual prices for them. There is no evidence that the plaintiff gave any particular instructions or directions to the special agents as to how they should proceed in this particular investigation, or that they were particularly directed by the plaintiff to do anything to induce this defendant to sell liquor to them during the prohibited hours. And even if the plaintiff had given such particular instructions to the special agents, I should not hold that such directions were improper, nor that the carrying out of such directions made the plaintiff or his special agents participants

in the defendant's wrongdoing. The act does not make the purchase of liquor during the prohibited hours an offense, and while it might be a question of good morals whether one should purchase liquor from one prohibited by the statute from selling the same, that question is not before the court for decision here.

The act, section 31, makes unlawful what otherwise would be lawful, namely, the selling of liquor during a certain interim. As the act does not prohibit the purchase of liquor during that interim, and has not actually limited and abridged the ordinary rights of citizens to traffic freely, and is highly penal in its nature, the court should not presume that it creates any offense not specifically defined in the statute itself.

Nor does it appear that, in purchasing said liquor from the defendant Oussani, the special agents practiced towards her any coercion, misrepresentation, fraud or deceit. She had the option to refuse to sell the liquor. The special agents were, so far as she was concerned, ordinary patrons of her place. They violated no right of the defendant in offering to purchase liquor from her as they did, for she then had no right to sell it. She knowingly, and without any special inducement, did a wrongful act in selling the liquor to the special agents. She took her chances with them, as she might have done in selling to any private citizen on her premises at that time. Certainly the maxim *nullus commodum capere potest de injuria sua propria* has no application to such a state of facts.

But, even if it should be conceded that the special agents committed a wrong to the defendant in purchasing liquor from her, the legal principle involved in the maxim would still have no application in this case.

The duties of the special deputies or agents are defined by section 10 of the statute. If the buying of liquor from the defendant, as they did, was not legitimately included in their acts of investigation of the sale of liquor by the defendant, or in relation to the compliance with law by her in her business of traffic in liquor, then they were acting without the scope of their authority in so buying, and the State of New York, which is the real plaintiff and party interested in this action, would not be bound by their wrongful act in the absence of proof that they were specially instructed and directed by their superior, the State Commissioner of Excise, to buy the liquor from the defendant at the time and in the manner disclosed by the evidence. No such

proof exists in this case. In this view of the case the acts of the special agents in so buying from the defendant were not their acts as special agents of the State, but acts done on their own responsibility as private citizens, and the State had the undoubted right to make use of their testimony as to the sale of the liquor to them by the defendant during the prohibited hours in the same manner subject to the established rule of evidence as though the said special agents were not in the employ of the State.

The motion for a new trial is, therefore, denied.

Motion denied.

First Appellate Department, December, 1900. Reported. 56 App. Div. 268.

In the Matter of the Petition of JOHN Q. A. HENRY, Appellant,
for an Order Revoking and Canceling Liquor Tax Certificate
No. 9,910, Issued to FRANK E. MORAN, Respondent.

Liquor tax certificate—The offense of obstructing the view into the saloon from the street requires the court to cancel it.

Semble, that a charge that the keeper of a liquor saloon, between the hours of one and five o'clock A. M., on a certain Sunday in May, "did have, keep and maintain screens, blinds, curtains, articles and things covering a part of each window of the room at said premises where liquors were sold and kept for sale, and did have, keep and maintain in the windows and doors of said premises opaque and colored glass, all of which and each of which obstructed and prevented a person passing from having a full view from the sidewalk, alley and road in front of and from the side and end of said building of a part of the bar and room, and of the whole thereof in said building where liquors were sold and kept for sale," in violation of subdivision h of the 31st section of the Liquor Tax Law (Laws of 1896, chap. 112), if sustained by satisfactory proof, requires the court to vacate and cancel the liquor tax certificate held by the keeper of such liquor saloon.

APPEAL by the petitioner, John Q. A. Henry, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of September, 1900, denying the petitioner's motion to cancel a liquor tax certificate issued to Frank E. Moran, and also from a judgment entered in said clerk's office on the 15th day of October, 1900, upon the said order.

Royal R. Scott, for the appellant.

Edwin F. Stern, for the respondent.

PER CURIAM. This proceeding was brought to revoke and cancel a liquor tax certificate issued to Frank E. Moran, who carried on business at No. 501 Sixth avenue, New York city, upon which premises he kept an hotel with which was connected a barroom. The petitioner Henry, a citizen of New York, describing himself as superintendent of the New York Anti-Saloon League, made charges against Moran of violations of the Liquor Tax Law, which charges are specifically set forth in a petition in due form. That petition was, by direction of the court, served upon Moran and the special deputy commissioner of excise for the boroughs of Manhattan and the Bronx. Moran answered it and directly denied some, and on information and belief others, of the charges made against him. The special deputy commissioner of excise also answered, stating that he had not sufficient knowledge or information to form a belief as to the allegations of the complaint relating to the alleged violations of law by Moran. On the petition and the answers an order of reference was made to take proof, and such proofs were taken by the referee named in the order; they were reported to the court, and the whole matter coming up for hearing, the justice at Special Term denied the motion to cancel the liquor tax certificate, and directed that the costs of the proceeding be paid by the petitioner Henry. It appeared in the proofs that Moran kept an hotel at No. 501 Sixth avenue, with fifteen sleeping rooms, but that he entertained male guests only. He and his family resided in the house; he employed seventeen servants and apparently conducted a respectable establishment. Two witnesses testified in support of the charges that liquor was sold on the premises on Sundays and at forbidden hours during the week. They were flatly contradicted, and the justice at Special Term remarked that he could not hold that the preponderance of proof was with the petitioner touching those alleged violations. That remark applied to every charge made in the petition of Henry, with one exception, and that is the charge numbered fifth in such petition, which reads as follows: That Moran, "on the 3rd day of May, 1900, between the hours of one and five o'clock A. M., and on Sunday, the 6th day of May, 1900, * * * d'd have, keep and maintain

screens, blinds, curtains, articles and things covering a part or each window of the room at said premises where liquors were sold and kept for sale, and did have, keep and maintain in the windows and doors of said premises opaque and colored glass, all of which and each of which obstructed and prevented a person passing from having a full view from the sidewalk, alley and road in front of and from the side and end of said building of a part of the bar and room, and of the whole thereof in said building where liquors were sold and kept for sale."

That charge was founded upon subdivision "h" of the 31st section of the Liquor Tax Law (Laws of 1896, chap. 112), which provides that it shall not be lawful "to have during the hours when the sale of liquor is forbidden any curtain, screen or blinds, opaque or colored glass that obstructs the view from the sidewalk, alley or road in front of or from the side or end of the building of the bar or place in such building where liquors are sold or kept for sale."

The testimony in support of this charge is somewhat vague as to the third of May, but there were two witnesses called by the petitioner who swore that on Sunday, the 6th of May, 1900, between the hours of four and six P. M., they could not see from the street into the barroom from any point on Sixth avenue or on the side street, and one of them (Sandford) swears that his view was obstructed by wooden cabinet work in a window on Sixth avenue, which extended above the height of a man's head, and that in the front window there were bottles and that he could not see in the barroom in any way; that he tried every way and could not see. Another witness (Booth) testified that he could not see into the interior of the barroom from any point; that he could not see inside the window or door at any point. What efforts these men made to see in are only generally mentioned. There was evidence on the part of Moran to show that this cabinet work in the window was so constructed that the barroom could be seen. There were no curtains or shades in this window, but there were panels. It was shown that Moran's instructions to his servants were to remove those panels during prohibited hours; and there was also evidence to show that the interior of the barroom could be seen at all times from the side street. Although this charge is a technical one, yet upon satisfactory proof of its violation it would be the duty of the court to revoke this license, for the value of the prohibitory provisions of this statute depends altogether

upon their rigid enforcement. But the evidence to sustain a technical charge of this character ought to be such as to satisfy the judgment and the conscience of the court.

There is no reason to doubt the truth of the statement of Moran and his witnesses as to the instructions given respecting the exposure of the bar to observation from the street during prohibited hours and the constant compliance with the requirement of the law in that respect. Naturally his servants could not testify to a particular hour on a particular date long passed, but they could testify to general conditions which would indicate that had the petitioner's witnesses made proper examination they could have seen into the barroom on the occasions upon which they testified that it was screened from observation.

The justice at Special Term evidently was not satisfied with the sufficiency and conclusiveness of the testimony of the witnesses in support of this charge. He was authorized on the whole evidence to reject their story, and, under the circumstances of the case, we do not feel called upon to reverse his decision.

The order appealed from is, therefore, affirmed, with costs.

Present — VAN BRUNT, P. J. RUMSEY, PATTERSON, O'BRIEN and McLAUGHLIN, JJ.

Order affirmed, with costs.

Third Appellate Department, December, 1900. Reported. 56 App. Div. 582.

HENRY H. LYMAN, as State Commissioner of Excise, Appellant,
v. GEORGE H. MEAD, Defendant, and FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND, Respondent.

Liquor tax certificate—A judgment refusing to vacate it sustained—A surety on the bond is not liable for false statements in the application for the certificate.

In an action upon a bond, given upon an application for a liquor tax certificate, in which it is claimed that the holder of the certificate violated the law by trafficking in liquors within the prohibited distance of a building occupied exclusively as a church, evidence that the holder of the

certificate, who was in possession of the premises for some time before the issuing of the certificate, sold "beer, whiskey and such," unaccompanied by evidence as to when this was done, is not sufficient to justify the Appellate Division in reversing a judgment of the trial court in favor of the surety on the bond.

Semble, that material false statements contained in an application for a liquor tax certificate create no liability on the part of the surety on the bond given to procure the same.

APPEAL by the plaintiff, Henry H. Lyman, as State Commissioner of Excise, from a judgment of the Supreme Court in favor of the defendant, the Fidelity and Deposit Company of Maryland, entered in the office of the clerk of the county of Rensselaer on the 31st day of March, 1900, upon the dismissal of the complaint by direction of the court after a trial before the court and a jury at the Rensselaer Trial Term.

Mead & Stranahan, for the appellant.

Boardman, Platt & Soley and *Francis G. Kimball*, for the respondent.

MERWIN, J. The plaintiff appeals from a judgment dismissing the complaint. The trial was before the court and a jury.

The action is upon a bond given by the respondent upon the application by George H. Mead for a liquor tax certificate. The bond is dated March 12, 1898, and the application and bond were filed and the certificate issued May 5, 1898.

It is alleged in the complaint that, from the date of the issue of the certificate, Mead was engaged in the traffic in liquors under and by virtue thereof at the premises stated in the application.

It was also alleged that in the application there were divers specified material statements that were false, among others, that the building intended to be occupied was not within two hundred feet of a building occupied exclusively as a church. It was specifically alleged that the building was within two hundred feet of a church, and on the trial this was proved beyond doubt.

At the trial, when the plaintiff rested, the defendant moved for a dismissal of the complaint on the ground that there had been no violation of the law shown for which the surety company was liable, and that there was no evidence of any violation of the Liquor Tax Law (Laws of 1896, chap. 112) after the bond took

effect. The plaintiff asked the court to direct a verdict in his favor for the amount of the bond. Thereupon the court granted the motion of the defendant, the judge stating that he thought the plaintiff must be nonsuited, because it had not been shown that Mead ever violated the law by carrying on or trafficking in liquors within the prohibited distance. The plaintiff excepted, but did not ask to go to the jury on any question.

The plaintiff claims that the allegations of the complaint were fully sustained by the proof, and that a verdict should have been directed for the plaintiff.

We may assume that the plaintiff proved that material statements in the application were false. This would not make the defendant liable under the decision of this court in *Lyman v. Schermerhorn* (53 App. Div. 33).

The defendant, however, might be liable if it were shown that, after the bond was filed, Mead engaged in traffic in liquors at the place named, it being within two hundred feet of a church, and, therefore, illegal. The defendant claims there was no such proof, and that on this subject the judge decided correctly.

The proof is indefinite on the subject. It may be fairly inferred that Mead was in possession for some time before the issuing of the certificate. The man of whom Mead bought, testified that Mead sold "beer, whiskey and such." He does not state when this was done, whether before the issuing of the certificate, or after, or both, or in what quantities. Mead kept a saloon, but this was not proof of the sale of liquor.

Probably a jury might have inferred from the evidence that Mead sold liquor after he obtained the certificate. The plaintiff, however, did not ask to go to the jury.

In *Dillon v. Cockcroft* (90 N. Y. 649) the head note is as follows: "Where, upon a trial the parties do not ask to go to the jury on the facts, but the defendant moves to dismiss the complaint, and the plaintiff moves the court to direct a verdict, this is in effect an agreement to submit the questions of fact to the court, and if there is any evidence to uphold the decision, it will be sustained." (See also, *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559; *Smith v. Weston*, 159 N. Y. 194; *Prentice v. Goodrich*, 1 App. Div. 15.)

The plaintiff not having asked to go to the jury is bound by the decision of the court on the facts. It should not be said as

matter of law that there was no evidence to sustain such decision, or that it was against the evidence.

So I think the judgment must be affirmed.

All concurred.

Judgment unanimously affirmed, with costs.

Court of Appeals. Reported. 165 N. Y. 188.

In the Matter of the Petition of JAMES HAWKINS, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 12,271, Issued to THIEL BROTHERS, a Firm Composed of CLARENCE C. THIEL and WILLIAM F. THIEL, Appellants.

1. Liquor Tax Law—Revocation of certificate upon ground of false statement as to continuous occupation of premises.

In an application for a certificate under the Liquor Tax Law (Laws of 1896, chap. 112, as amd.) for the traffic in liquors upon premises situated in a church and residential district within the limits prescribed by the law, where the premises were used for such traffic at the time of its enactment, it is not necessary to state that they were occupied continuously for such traffic from that time to the date of the application, and a statement therein to that effect, even if untrue, affords no reason for the revocation of the certificate upon the ground of a false statement in the application.

2. Abandonment or non-user of privilege.

It seems, that the privilege conferred by the statute which secures to the property owner a right to a certificate, without consents, may be lost by abandonment or non-user, when the facts or circumstances are such as to justify the conclusion that the owner intended to discontinue the liquor traffic at the place.

Matter of Hawkins, 54 App. Div. 617, reversed.

(Argued November 13, 1900; decided December 11, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 21, 1900, affirming an order of Special Term revoking

and canceling liquor tax certificate No. 12,271, issued to Thiel Brothers.

The facts, so far as material, are stated in the opinion.

Robert F. Schelling for appellants. The answer to the question was not such a false statement of a matter of fact as would justify a revocation of this certificate. (*Matter of Kessler*, 163 N. Y. 207.) It was the intention of the Legislature, as is evidenced in the exception of subdivision 2, section 24 of the Liquor Tax Law, to reserve to premises used for the traffic of liquor on March 23, 1896, in church and school districts any rights or interests which might have accrued to those premises by such user. (*People ex rel. v. Hamilton*, 25 App. Div. 429; *People ex rel. v. Lammerts*, 18 Misc. Rep. 343.) A property owner who, prior to March 23, 1896, fitted up a building for saloon purposes, which building was actually used as a saloon on that date, has a vested property right in the traffic in liquor in that saloon, and is as much entitled to the protection of the statute as the occupant and licensee; and that vested interest is such a one that a mere temporary suspension in the traffic of liquor by the occupant on the premises will not destroy the privilege to the owner without some acquiescence on his part. (*Matter of Kessler*, 163 N. Y. 205; *Matter of Loper*, 53 App. Div. 576.)

L. H. Jones for respondent. The removal by the holder of the liquor tax certificate of his liquor stock and barroom fixtures, the removal by him of his liquor tax certificate from the licensed premises, the abandonment of said certificate by him, and the suspension of traffic in liquors thereat for sixteen days, during four of which another tenant occupied the same for another purpose, is an abandonment of the traffic in liquors at said premises. (*People ex rel. v. Lammerts*, 18 Misc. Rep. 343; *Matter of Klevesahl*, 30 Misc. Rep. 361; *People ex rel. v. Hamilton*, 25 App. Div. 423; *Matter of Loper*, 53 App. Div. 576.)

O'BRIEN, J. This proceeding was instituted by a private citizen to revoke and cancel a liquor tax certificate. The facts upon which the application was based were agreed upon at the hearing and appear in the record.

In the month of April, 1894, the owner of certain premises in

Buffalo leased them to a tenant. The lease was in writing and through various *mesne* assignments passed to the appellants, who procured the certificate in question. It is admitted that the liquor traffic was actually and lawfully carried on upon the premises on the 23d of March, 1896, and had been for a long time prior thereto, and that they were so used continuously until May 1st, 1898. From the latter date up to and including April 13, 1899, the traffic was also actually and lawfully carried on at the place by the tenant then in possession under assignments of the lease; but on the 14th of April, 1899, this tenant delivered the tax certificate to the commissioner of excise who had issued it and left it with him, though it does not appear to have been surrendered. The tenant on that day moved from the premises to another place in the same city and took with him the saloon fixtures and furniture used at the place in question and his stock of liquors and other goods, intending to conduct the same business at another place. Thus, so far as the tenant was able to accomplish that result, the traffic in liquors was discontinued at this place, and it is claimed that the right to a certificate without consents ceased by the act of the tenant. The tenant, however, retained possession of the premises until the expiration of the lease on the first of May, 1899. Since the latter date the appellants in this record have become the tenants of the premises and procured the certificate in question under which they carried on the traffic in liquors up to the time when it was terminated by the order now under review, which revoked the certificate.

The ground upon which the order was made is that the certificate was granted upon an application which contained false statements and representations. The only statement in the application alleged or claimed to be false was this: The applicant stated that he could lawfully carry on the liquor traffic on the premises, which, it may be observed, was not the statement of any fact, but of a legal conclusion. He also stated that the liquor traffic had actually and lawfully been carried on upon the premises on the 23d day of March, 1896, and it is stipulated that that statement was true. He stated further that since the latter date the premises had been occupied continuously for such traffic, and it is said that this statement was untrue, because the tenant then in possession removed his stock of goods from the place sixteen days before his lease expired, and in that way the continuity of the traffic was interrupted. It is not necessary in this

case to determine the effect of that transaction. It is contended that the right conferred by the statute to a license without consents as to places where the business was carried on at the time of the enactment of the present law could not be disturbed by the act of a tenant in possession without the knowledge or consent of the owner. Whatever the law may be with respect to that question, we are quite clear that the certificate in this case should not have been revoked.

The statement in the application upon which the order was based, even if untrue, was wholly immaterial, and an order revoking a license for a false statement cannot be predicated upon such a representation. There was power under the law to issue the certificate, whether the business had been continuously carried on at the place in question or not after the enactment of the present law. The statute does not require the use of the premises for the purpose of the traffic to be continuous. The word "continuous" does not apply to that provision of the statute, or to the exception contained therein in favor of places like this, as will be seen by a careful reading. It appears from the stipulations as to facts that since January, 1898, there has been and now is a building occupied and used continuously and exclusively as a church, located within two hundred feet of the premises in question; but the prohibition against conducting the traffic specified in section 24 has no application to the place in question, by reason of the proviso which expressly excepts a place of business where the traffic was carried on at the time of the enactment of the law on the 23d day of March, 1896. That proviso covers all cases where the traffic was actually and lawfully carried on at that date, and it is not necessary that it should have been continuous down to the time of the filing of the application for a certificate.

Nor is it necessary to produce the consents required by subdivision 8 of section 17. All that is necessary to state in order to relieve the applicant from the necessity of filing consents is that the traffic was actually and lawfully carried on upon the premises on the 23d of March, 1896. The word "continuously," which is used in the same subdivision, refers to a case where consents are necessary for other places, and having been once obtained and filed are preserved and kept in force so long as the place shall be continuously occupied for the traffic. Inasmuch as no consents were necessary and the place in question was

expressly excepted from the provisions of the law which required consents to be filed, the statement in the application, whether true or false, was utterly immaterial.

In the *Matter of Kessler* (163 N. Y. 205) this question was not raised or passed upon. It was assumed by both parties in that case that it was necessary under the statute that the traffic should be continuous in order to entitle the applicant, who had not procured the consents prescribed, to the certificate. Clearly it is not, as will be seen by a careful reading of the statute. All that was decided in that case was that, under the facts and circumstances disclosed, the traffic *was* continuous within the fair meaning of the statute.

We do not intend to hold that the privilege conferred by the statute, which secures to the property owner a right to the certificate without consents, as to places of this character, may not be lost or abandoned by the intentional act of the owner of the property. The privilege is not attached to the property in perpetuity, and is not a thing that necessarily and under all circumstances runs with the land. It may be lost by abandonment, or nonuser, when the facts and circumstances are such as to justify the conclusion that the owner intended to discontinue the liquor traffic at the place. When that intention is clearly established the period of time during which the place is vacant, or used for other purposes, is not very material. But the facts of this case do not afford any ground or give any room for the application of such a principle.

It follows, therefore, that the statement made by the applicant in this case, being entirely immaterial, was not a false statement within the meaning of the statute.

The orders of the Appellate Division and of the Special Term should be reversed and the proceedings dismissed, with costs.

PARKER, Ch. J., GRAY, HAIGHT, LANDON, CULLEN and WERNER, JJ., concur.

Orders reversed, etc.

Court of Appeals. Reported. 165 N. Y. 618.

In the Matter of the Petition of LOUIS N. LOPER et al., Appellants,
for an Order Revoking and Canceling the Liquor Tax Certificate
Issued to DANIEL SLATTERY and JAMES J. HAMMOND,
Composing the Firm of SLATTERY & HAMMOND, Respondents.

Matter of Loper, 53 App. Div. 576, affirmed.
(Argued November 12, 1900; decided December 11, 1900.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 31, 1900, reversing an order of Special Term revoking and canceling liquor tax certificate No. 26,903, issued to Daniel Slattery and James J. Hammond.

G. E. Judson for appellants.

Richard Crowley for respondents.

Order affirmed, with costs, on authority of *Matter of Hawkins* (165 N. Y. 188).

CONCUR: PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, LANDON, CULLEN and WEBNER, JJ.

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Supreme Court, Kings Special Term, January, 1901. Unreported.

PEOPLE ex rel. DAVID STEVENSON BREWING COMPANY, (Barry) v.
HENRY H. LYMAN.

McCrea, Somerville & Taylor, for plaintiff.

P. W. Cullinan, for defendant.

DICKEY, J. Motion for a peremptory writ of mandamus denied. Relator may have alternative writ if he wishes. Fallert Brewing Co. case is an essentially different case from this.

County Court, Chautauqua County, January, 1901. Reported. 33 Misc. 544.

Matter of the Petition of GERTRUDE A. HAIGHT for an Order Revoking and Canceling Liquor Tax Certificate No. 24,354, Issued to WARREN J. PARSELL.

Liquor Tax Law—Exemption from consents not conferrable upon an adjoining building of the certificate holder by his incorporating it into the building exempted.

The owner of premises, occupied exclusively as a hotel on the 23d day of March, 1896, thereafter procured a liquor tax certificate for it, being exempted by statute from procuring the statutory consents. In 1899, after taking in a building, across an alley, acquired by him under a separate deed and which had been used as a hardware store, he applied to have the certificate transferred to the latter building and falsely stated in his application that there were no buildings occupied exclusively as dwellings within 200 feet of the hardware store.

Held, that the privilege which attached to the hotel could not be made to inure to the benefit of the independent hardware store by incorporating the latter into the hotel, that the statement of the application was false as matter of fact, and that the certificate must, therefore, be forfeited.

PROCEEDINGS, under the Liquor Tax Law, for the revocation and cancellation of a liquor tax certificate.

Franz C. Lewis, for petitioner.

Ottaway & Munson, for Warren J. Parsell.

FISHER, J. This proceeding was brought by petition, under the provisions of subdivision 2 of section 28 of chapter 112 of the Laws of 1896, as amended by chapter 312 of the Laws of 1897, for an order revoking and canceling liquor tax certificate No. 24354, issued to Warren J. Parsell, of Brocton, on the ground that material statements in the application of the holder of such certificate were false. The facts are either stipulated or contained in the papers without dispute, all allegations of the petition in reference to alleged illegal selling of liquors, etc., being eliminated from the case upon the hearing, and the only question remaining is one of law.

On the 23d day of March, 1896, at the time the Liquor Tax Law went into effect, Warren J. Parsell was conducting a hotel, situated upon the south side of Main street, in the village of Brocton, Chautauqua county. He had no license for the sale of intoxicating liquors at that time, but, subsequently, applied for a liquor tax certificate, which was issued to him, and from that

time down to about the 3d day of September, 1900, he continued to sell liquors upon the premises described in his various applications for such certificates. Mr. Parsell was the owner of these premises, and, under the Liquor Tax Law, he was exempted from the provisions requiring the consent of the property-owners, whose "Nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling," because of the fact that it was "occupied as a hotel" on the date of the passage of the act. § 17, subd. 8. This exception, from the general policy of the law of the State, which was designed to protect residential districts from the presence of saloons and hotels, where intoxicating liquors were sold without the consent of the people living in the vicinity, was intended to preserve the property rights existing at the time of the enactment of the Liquor Tax Law, and is generally conceded to be a right attached to the premises. *Matter of Kessler*, 163 N. Y. 205-208. At the time the Liquor Tax Law was enacted, and while Mr. Parsell was conducting his hotel without a license, there was a building upon the same side of the street, and separated by an alley from the hotel premises, which was used as a hardware store, and this building continued to be so used down to the summer of 1899. On or about the 1st of September in that year, Mr. Parsell purchased the premises occupied by the hardware store, and, subsequently, made certain improvements, by which to outward appearances, the hotel building and hardware store were made one, and in September of 1900, he made application to the county treasurer to have the liquor tax certificate then in force transferred to the building which had been purchased the year before and merged in the hotel. In the application for this transfer Mr. Parsell states, under oath, that there are no buildings occupied exclusively as dwellings within the distance mentioned in the statute, but, it is now conceded that there are two such buildings, one of them being occupied by the petitioner, the theory of Mr. Parsell being that the answer is not a material statement, on the part of the applicant, as the consents required by section 17 of the Liquor Tax Law were not necessary. The object of the statute is the raising of a revenue, primarily considered (*Matter of Purdy*, 40 App. Div. 133), and were it true that it was not necessary, as stated in answer to the

eighteenth question of the application blank, to have the consents of these persons occupying buildings exclusively as dwellings, we would have little difficulty in agreeing with this contention. We are of the opinion, however, that the position of Mr. Parsell cannot be supported; that the building purchased by him in 1899 was not entitled to the privilege existing in favor of the hotel property, and that it was necessary, therefore, before it could be used for the sale of intoxicating liquors, that the consents required by section 17 of the act should be secured and filed with the application. Mr. Parsell, in his application, concedes that the premises were not actually occupied as a hotel on the 23d day of March, 1896, and in answer to the question, "Since what date have the premises been continuously occupied for such hotel traffic?" he answered, "New place." If the premises were not actually occupied as a hotel on the 23d day of March, 1896, and if it was a "new place," then it was clearly subject to the general rule, and to the declared policy of the State, and the consents required by section 17 of the Liquor Tax Law were necessary. If they were necessary, then the statement of Mr. Parsell, that there were no buildings used exclusively as dwellings within the limits fixed by the statute, was material, and, being false, his right to the certificate is not shown, and he has no legal claim to the privileges which it was intended to secure.

By the provisions of subdivision 3 of section 17 of the Liquor Tax Law, the applicant for a certificate is required to make a statement under oath, of "The premises where such business is to be carried on, stating the street and number, if the premises have a street and number, and otherwise such apt description as will reasonably indicate the locality thereof, and also the specific location on the premises of the bar or place at which liquors are to be sold," thus indicating the intention of the lawgiver to confine the traffic within specific limits. In the application of Mr. Parsell, in May, and again, in September, on the occasion of the transfer, he described the premises as "South side of Main street, in the village of Brocton, N. Y.," which is hardly an "apt description" of the premises, as it might be said of any one of a dozen or more buildings in that place. The law unquestionably intended that the premises should be designated so that they could be distinguished from other premises in the same locality, and that the certificates, as well as all exceptions to the general provisions of the law, should be confined strictly to the premises

to which they were applicable, and not to such premises as might, in the future, be connected with the original premises. This is evident from the provisions of subdivision 6 of the same section, which provides that "There shall also be filed simultaneously with said statement, a consent in writing that such traffic in liquors be so carried on in such premises * * ~ except in such cases where such traffic in liquors was actually lawfully carried on in said premises so described in said statement on the twenty-third day of March, eighteen hundred and ninety-six, in which case such consent shall not be required." It is certain that when Mr. Parsell took title to the hardware store property, he could not have procured a certificate to sell liquors on such premises, without the consents required by section 17 of the act, without a violation of the law; he held those premises by conveyance, separate and distinct from that which the hotel property was granted. In law the properties were as distinct as though they had been separated by a highway, or by any number of intervening properties, and no new rights accrued to Mr. Parsell, in so far as the privilege of selling liquors is concerned, by the work of boarding-up the alleyway between the buildings and connecting them under a single roof. If this could be done the whole policy of the law could be defeated by merging the various intervening buildings under one roof, or by connecting them by passage-ways, until, at last, a saloon might be located at the very doorway of a home or church, though the parent saloon or hotel might be several blocks removed.

The Legislature has declared the public policy of the State to be to separate the hotels and saloons from the immediate presence of the homes, the churches and the schools. It was necessary, to save the constitutional rights of property-owners, not to make this rule apply to those who had investments which would be depreciated by denying to them the right to continue in the business of selling liquors where they were established, but it is no part of the duty of the courts to extend this exemption, and we shall be within the law in holding that the consents required by section 17 of the Liquor Tax Law were necessary to give Mr. Parsell any right to make use of his recent purchase for the purpose of selling liquors upon such premises.

Certificate revoked, with fifty dollars costs, and disbursements to be taxed.

Fourth Appellate Department, January, 1901. Reported. 57 App. Div. 549.

HENRY H. LYMAN, as State Commissioner of Excise, Respondent,
v. TIMOTHY KANE and the UNITED STATES GUARANTEE COMPANY,
Appellants.

Surety upon a bond given by an applicant for a liquor tax certificate—
False representations contained in the application for the certificate
do not render the surety liable—A valid certificate is a condition
of liability.

Where a bond given by an applicant upon procuring a liquor tax certificate is conditioned as follows, "If the said liquor tax certificate applied for is given unto the said principal and the said principal will not, while the business for which such liquor certificate is given shall be carried on, * * * violate any of the provisions of the Liquor Tax Law * * * then the above obligation," the fact that the certificate was procured by false representations made by the applicant as to material facts, and was, therefore, void, relieves the sureties from liability.

Semble, that a valid certificate legally issued and given to the principal is a condition precedent to the liability of the sureties.

APPEAL by the defendants, Timothy Kane and another, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Oswego on the 5th day of July, 1900, upon the decision of the court, rendered after a trial at the Oswego Special Term, overruling the defendants' demurrer to the complaint.

John De Witt Warner, for the appellants.

Mead & Stranahan, for the respondent.

WILLIAMS, J. Action brought upon a bond given by defendant Kane upon procuring a liquor tax certificate, to recover the penalty of the bond, \$700.

The complaint alleged the making of the application, the giving of the bond and the issue of the certificate (to traffic in liquor in premises on corner West Fourth and Lake streets, Oswego) on April 29, 1898. It further alleged false statements in the application, viz.: That the applicant might lawfully carry on the traffic in liquor on the premises; that such traffic was lawfully carried on thereon March 23, 1896, and premises had been con-

tinuously occupied for such traffic from 1886 till after March 26, 1896; that they were actually occupied as stated March 23, 1896, and had been since 1886, and that applicant intended to carry on a *bona fide* hotel on the premises, whereas the traffic in liquors was not actually carried on in the premises March 23, 1896, and the premises were not actually occupied as a hotel at that date and did not conform to the requirements of section 31 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), no consents of the owners of two-thirds of the thirteen dwellings within the two hundred feet required by subdivision 8, section 17 of the law having been filed with the application and, therefore, Kane could not and did not lawfully carry on the traffic in liquor on the premises described in the tax certificate and did not lawfully obtain such certificate. The complaint further alleged that Kane did traffic in liquors under the certificate at the place designated therein, and that the certificate was finally revoked April 24, 1899, in a proceeding commenced December 9, 1898.

The claim is that the sureties are liable because the traffic was illegal and a violation of the provision of the Liquor Tax Law. The traffic was under a certificate in form authorizing it. The application was in form such as to authorize and require the treasurer to issue the certificate. Still the certificate was void because in fact the traffic was illegal under the law, the application was false as to the facts, and the certificate afforded no protection to the traffic under it in view of such facts.

That the traffic was in fact illegal and a violation of the provisions of the law cannot be doubted. The premises were not used and occupied as a hotel and for the traffic in liquor March 23, 1896, and no consents of the owners of the thirteen dwellings within two hundred feet of the premises were filed with the application. Under these circumstances, no certificate could legally be issued. If these facts had appeared the treasurer would have had no power to issue a certificate. (§ 19.) The provisions as to requiring the consents of the owners of dwellings were made for the benefit of the public, and no mistake, collusion or fraud on the part of the treasurer, or the applicant, or both, could make a certificate or the traffic in liquors legal in a case where such consents were necessary, unless the consents were actually filed.

This was such a case, and the consents not having been filed the

traffic was illegal, whatever the application or certificate may have been. The certificate was, therefore void, was procured by the fraud of the applicant and was no protection against the traffic.

The only question is whether the sureties were liable on the bond for such illegal traffic. The condition of the bond is (so far as we need to quote it here): "If the said liquor tax certificate applied for is given unto the said principal and the said principal will not, while the business for which such liquor tax certificate is given shall be carried on, * * * violate any of the provisions of the Liquor Tax Law * * * then the above obligation," etc.

The claim made is that the tax certificate to be given to the principal, as a condition of making the sureties liable, must be a valid certificate, legally issued and given to the principal.

We think this is clearly correct. The bond is to protect the State with reference to the conduct of the business by the principal under a certificate legally issued to him. It is not intended to protect the State against the fraud of the principal in securing a certificate which is void and in effect no certificate at all.

This question, or one entirely like it, was recently passed upon by the third department, Appellate Division, in *Lyman v. Schermerhorn* (53 App. Div. 32). The certificate there was void because it authorized a person to traffic in liquors who had been convicted of a felony. The statute forbade this (§ 23), and required the applicant to state in his application that he had not been so convicted. (§ 17, subd. 5.) The report of the case does not state what the application contained on this subject, if anything. If it did not comply with the statute, the treasurer had no right to issue the certificate. (§ 19.) If the application stated falsely the fact with reference to the question, then the certificate was procured to be issued by the fraud of the applicant. It was equally invalid in either event. The public could not have the applicant forced upon them as a trafficker in liquor, whatever the application for the certificate contained. The fact of conviction for felony made all traffic in liquor by the applicant illegal and a violation of the law. The court in that case held that the sureties were not liable for such illegal traffic because of the invalidity of the certificate. We fully concur in the reasons given in that case for holding the sureties not liable, and regard the rules of law there laid down as applicable to this

case. We are here dealing with a case where the right to recover is based upon the illegality of the certificate. If the certificate was legal the cause of action would not exist. We do not intend to lay down any principle of law under which a surety could allege the invalidity of a certificate to defeat a cause of action not based upon the illegality of the certificate.

The judgment appealed from should, therefore, be reversed, with costs, and judgment be ordered sustaining the demurrer to the complaint, with costs, and with leave to plead over upon payment of costs.

All concurred.

Interlocutory judgment reversed, with costs, and demurrer sustained and final judgment ordered dismissing the complaint as to the appellant, with costs.

Fourth Appellate Department, January, 1901. Reported. 57 App. Div. 635.

In the Matter of the Petition of GEORGE W. PECK, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 25,679, issued to NORMAN B. CARGILL, Appellant.

Order affirmed with costs.

All concurred.

Supreme Court, New York Special Term. Reported. N. Y. L. J., February 6, 1901.

HENRY H. LYMAN *v.* FRANK MOREL, et al.

R. R. Scott, for plaintiff.

Page & Eckley, for defendants.

CLARKE, J. This is an action to recover upon an excise bond given under the Liquor Tax Law. A verdict was directed for the plaintiff for the amount of the penalty named in the bond of

\$1,600, with interest thereon from the time of breach of condition, subject to the opinion of the court as to whether interest upon such bond was recoverable. Section 1915 of the Code of Civil Procedure, "Action on a penal bond," provides: "But the damages to be recovered for a breach, or successive breaches, of the condition, cannot in the aggregate exceed the penal sum except where the condition is for the payment of money, in which case they cannot exceed the penal sum, with interest thereupon from the time when the defendant made default in the performance of the condition." In the case at bar it is clear that the bond is a penal bond with a penalty of \$1,600. It is clear also, that the condition is not for the payment of a sum of money. The condition set forth in the bond is "that the said principal will not * * * suffer or permit any gambling to be done in the place designated by the liquor tax certificate in which the traffic in liquors is to be carried on * * * or suffer or permit such premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law * * * and the said principal will pay all fines and penalties incurred or imposed for violation of the Liquor Tax Law and any judgment or judgments recovered or entered against the said principal for or on account of any such violation of said law." That is a condition that the principal will not violate the law. That being the condition, section 1915 applies, and the amount of the recovery is limited to the penalty. Judgment must, therefore, be entered upon the verdict for \$1,600.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
February 19, 1901.

HENRY H. LYMAN *v.* DEMETRIUS RAKOPOULOS, et al.

FITZGERALD, J. Leave was granted at the Trial Term (upon conditions) to withdraw a juror to enable defendants to make a motion at Special Term for leave to amend answer. The terms imposed by the trial justice have not been complied with. Notwithstanding this fact defendants seek the aid of the court upon this application and ask leave for an order permitting them to serve their answer. Under the circumstances as above stated, motion must be denied.

New York Special Term, Reported. N. Y. L. J., February 19, 1901.

HENRY H. LYMAN *v.* DEMETRIUS RAKOPOULOS.

FITZGERALD, J. Motion denied. (*Lyman v. Young Men's Cosmopolitan Club*, 38 App. Div. 220.)

County Court, Monroe County, February, 1901. Unreported.

In the Matter of the Petition of GEORGE W. PECK to Revoke the Liquor Tax Certificate of JOHN A. BUCKLEY.

Nelson E. Spencer, for petitioner.

Fahy Galligan, for respondent.

SUTHERLAND, J. Upon the whole evidence submitted, it is established that intoxicating liquors were unlawfully sold in the hotel of the respondent to Wilson and Loucks, on Sunday, July 22, 1900, by an agent, servant and employee of respondent.

Findings may be prepared, together with a final order, and submitted for settlement on two days' notice; and the petitioner is entitled to taxable costs and disbursements.

When the motion for the revocation was made the respondent raised, for the first time, an objection to the jurisdiction of the county judge to act in the premises, and moved for a dismissal of the whole proceeding upon the ground that the petition contains no averment that the petitioner is a citizen of the State of New York.

Undoubtedly the petition is defective in this regard, as the statute requires the petitioner, under section 28, to be a citizen, and the petition, which inaugurates the proceeding, should state all the facts which establish the jurisdiction of the county judge to proceed with the case. (*People ex rel. Smaw v. McGowan*, 44 App. Div. 30.) In the case just cited the respondent did not contest the application upon the merits, but challenged the sufficiency of the verification of the petition. His objection was

held good by the trial judge, and on appeal the order dismissing the proceeding was sustained on the ground that although the verification was good the petition did not contain an allegation showing petitioner to be authorized to institute the proceeding as a taxpayer of the county, under section 29 of the Liquor Tax Law.

But in this case no preliminary objection was taken to the sufficiency of the petition; an answer was filed on the merits, a reference was ordered and a large number of hearings were had before the referee, on the first of which the petitioner testified that he is a citizen, of the State of New York. On the incoming of the referee's report with an opinion adverse to the respondent on the question of illegal sales, a motion was made by the respondent to reopen the case for the purpose of taking the evidence of a witness who was absent from the State at the time of the previous hearings but had since returned. An order was made permitting the case to be reopened on the payment of the referee's and stenographer's fees and ten dollars motion costs. At the end of the time prescribed for the performance of these conditions the respondent again appeared and asked for further extension of time to pay the costs which was denied, and then, for the first time, the objection was raised as to the sufficiency of the petition.

Under the circumstances it is too late for the respondent to raise the objection, and if necessary an amendment should be allowed *nunc pro tunc* permitting an allegation to be inserted in the petition of the citizenship of the petitioner, to conform to the proofs actually taken. It is true that the county judge sitting in this proceeding has a limited jurisdiction. But the duty is imposed upon him to hear and determine the matter, and where the jurisdictional facts exist, the county judge must be deemed to be invested with such incidental power as is inherent in other judicial tribunals in the trial of such cases, to insure the accomplishment of the just objects sought to be attained by the conferring of such judicial authority. I think there is no doubt but that a county judge holding a proceeding under this act is authorized to grant such an amendment. As was said by Mr. Justice Swayne in the United States Supreme Court in *Tilton v. Cofield*, 93 U. S. 163, "Allowing amendments is incidental to the exercise of all judicial power and is indispensable to the ends of justice."

It has been held repeatedly that although the United States District Courts are courts of limited jurisdiction, in cases where jurisdiction depends upon the fact that plaintiff and defendant are citizens of different States, if the fact actually exists, although it is not stated in the pleadings and an answer on the merits is filed, the defect in the complaint is amendable on motion. (*Hilliard v. Brevoort*, 4 McLean, 24; *Morgans, Exr., v. Gay*, 19 Wallace, 81.) It is sufficient to sustain the judgment if somewhere in the record the jurisdictional fact appears. (*Denny v. Pironi*, 141 U. S. 121.) In courts of inferior jurisdiction of this State, where jurisdiction of the action depends upon the residence of the defendant, it has been held that going to trial upon the merits without raising any objection as to the sufficiency of the complaint is a waiver of the defect if the proper residence is proven on the trial, and that an amendment, if necessary, should be allowed to the complaint after the trial. (*Hogan v. Glueck*, 2 App. Div. 82; *Jenkin v. Hall*, 66 State Reporter, 201; *Bunker v. Langs*, 76 Hun, 543.) The rule is stated in the Encyclopaedia of Pleading and Practice, Vol. 1, page 511, as follows: "Where the court has jurisdiction of the subject-matter and the defendant has appeared in court to contest the merits, the declaration or complaint may be amended by inserting averments necessary to perfect the jurisdiction of the court upon the record."

The respondent relies upon *People ex rel. Ryan v. Spencer*, 55 N. Y. 1, and *People ex rel. Green v. Smith*, 55 N. Y. 137, to support his contention that this proceeding is *coram non judice*. But the cases just cited arose under the act permitting towns to be bonded to aid in the construction of railroads. It was there held that the jurisdiction of the county judge to make any adjudication under the act was contingent upon the presentation to him, in the first instance, of a petition in strict conformity with the act. But the reason for the very stringent rule adopted by the Court of Appeals in the line of cases arising under that act is seen in the statement of Judge Andrews in *Town of Wellsboro v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 182: "The bonding acts are subversive of the just rights of the minority who do not consent to the issue of the bonds." Only a portion of the taxpayers petitioned that the town be bonded and only a small number appeared in the proceeding as contestants. The result of the proceeding was to cast a charge upon the entire taxable property in the town, and

those taxpayers who did not appear as petitioners or contestants could not be said to consent to anything in derogation of their rights; and it is plain that the same rule permitting an amendment could not apply in such a case as obtains in these proceedings, where the only party affected has appeared and answered upon the merits and gone to trial and heard the defect in the petition supplied by proof without objection being raised.

County Court, Monroe County, February, 1901. Unreported.

In the Matter of the Application of GEORGE W. PECK to Revoke
the Liquor Tax Certificate of EMANUEL W. KING.

Nelson E. Spencer, for petitioner.

William J. Baker, for respondent.

H. SUTHERLAND, Monroe Co., J.:

Held: That the evidence establishes an unlawful sale of liquor by an agent and employee of the respondent on his premises on Sunday, July 15th, and on Sunday, July 22, 1900, and that the petitioner is entitled to an order revoking and canceling the certificate with costs. Findings may be prepared by counsel for the petitioner, together with the final order, and submitted for settlement on two days' notice to counsel for respondent.

Supreme Court, Kings Special Term, February, 1901. Unreported.

In the Matter of the Petition of NORMAN PLASS to Revoke the
Liquor Tax Certificate of MICHAEL FOLEY.

H. C. Spurr, for petitioner.

Page & Eckley, for respondent.

GAYNOR, J.: I distrust this case. One of the witnesses for the petition shows himself to be of poor character, and another of them refuses to answer touching his personal character and con-

duct, and cases like this, which they have brought, seem to have been discontinued without explanation. Proceedings such as these may be easily used for blackmail. Persons who engage in bringing proceedings like these, as a business, or in detecting the vices of others, ought themselves to be above suspicion. The application is dismissed.

Supreme Court, Putnam Special Term, February, 1901. Unreported.

In the Matter of the Petition of NORMAN PLASS to Revoke the
Liquor Tax Certificate of HENRY MULLER.

H. C. Spurr for petitioner.

H. W. Leonard, for respondent.

W. M. SMITH, J. It is not disputed by the respondent that the Wood house, the front Jaycox house, the Monroe house and the Phillips house are within two hundred feet of his place of business. He admits that the Wood house, the Jaycox house and the Monroe house were used exclusively as dwellings. If the Phillips house was used exclusively as a dwelling the respondent did not obtain the requisite number of consents. I have carefully read the evidence and I concur with the referee that the only conclusion permissible therefrom is that the Phillips house has been used exclusively for a dwelling since 1894. It follows that the certificate of respondent must be revoked with costs:

Supreme Court, Kings Special Term, February, 1901. Unreported.

In the Matter of the Application of BENJAMIN W. WILSON to
Revoke the Liquor Tax Certificate of LEON GEISMAN.

GAYNOR, J.: The mere fact that the boys were allowed to meet in a school building at night at a sort of club or association to keep them off the street does not enable us to say that the building is not used exclusively for school purposes.

Application granted.

Court of Appeals. Reported. 166 N. Y. 124.

RICHARD A. MCNEELEY, Respondent, *v.* JOHN WELZ et al.,
Appellants, Impleaded with Others.

1. Chattel mortgage upon liquor tax certificate invalid—When good in equity as a contract to assign certificate.

A chattel mortgage executed upon the mortgagor's "right, title and interest to a license to sell beer or to a renewal thereof," which license was issued under the old law, confers upon the mortgagee no right at law to a certificate subsequently issued under the Liquor Tax Law (Laws of 1896, chap. 112), since the certificate was not in existence when the mortgage was given, is not a chattel and can not be mortgaged; the mortgage, however, is good in equity as a contract to assign the new certificate when acquired, since it transfers the existing license and any "renewal thereof" which necessarily refers to the only renewal possible under the law as it existed when the mortgage was given.

2. Certificate not subject to levy and sale under execution.

Where the certificate has subsequently been issued to the mortgagor, judgment creditors who issue an execution and levy upon his interest therein take nothing by virtue thereof, because the certificate is a mere chose in action, incapable of seizure or delivery by the sheriff, is not within the description of personal property bound by execution as laid down in the Code of Civil Procedure (§§ 1405, 1410, 1411), and is not subject to levy and sale thereunder at least unless a warrant of attachment has been issued and a levy made by virtue thereof.

4. Right of mortgagee to rebate on surrender of certificate.

Where, subsequent to the attempted levy, the certificate is surrendered to a special deputy commissioner of excise by the mortgagor, who receives a surrender receipt stating that there is a *pro rata* rebate of a specified sum due for an unexpired period, which receipt he assigns to the mortgagee, upon the refusal of the commissioner to pay the amount thereof to either of the claimants, the mortgagee may maintain an action in equity to enforce his right to such rebate, since he has no adequate remedy at law because his right to the certificate, so far as it rests upon the chattel mortgage, is good only in equity, and he is not obliged to rely solely upon an assignment made after the execution was issued and claims had been asserted by virtue thereof.

McNeeley v. Welz, 20 App. Div. 567, affirmed.

(Argued January 10, 1901; decided February 26, 1901.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 11, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

M. Hallheimer, for appellants.

The chattel mortgage did not cover the liquor tax certificate. A liquor tax certificate is not a license, and, therefore, not a renewal of a license. (*Niles v. Mathusa*, 162 N. Y. 549). The chattel mortgage was void as to the appealing defendants herein and, therefore, whether the liquor tax certificate was or was not included in the mortgage, the plaintiff has no rights either at law or in equity against the appellants. (*Karst v. Gane*, 136 N. Y. 316.) The plaintiff has no valid title to the rebate money whether levy had ever been made or not, for he was not a *bona fide* purchaser and he had full notice of the execution and levy. (*Osborn v. Alexander*, 40 Hun, 323.)

E. D. Benedict, for respondent.

The levy was invalid and ineffectual. (*McAllister v. Bailey*, 14 Civ. Pro. Rep. 401; *Anthony v. Wood*, 96 N. Y. 180; *U. S. v. Graff*, 4 Hun, 634; *U. S. v. Graff*, 67 Barb. 304; *Smith v. Orser*, 42 N. Y. 132; *Hankinson v. Page*, 12 Civ. Pro. Rep. 279; *Denton v. Livingston*, 9 Johns. Ch. 98; *Ranson v. Mener*, 3 Sandf. 692; *Pardee v. Ditch*, 9 Lans. 306; *Ingalls v. Lord*, 9 Con. 240.) Plaintiff's title under the chattel mortgage was absolute. (Smith on Chattel Mortgages, 2; *Noyes v. Wyckoff*, 30 Hun, 466.) The decision of the court denying defendant's motion to dismiss, upon the ground that plaintiff had an adequate remedy at law, was proper. (*Hankinson v. Page*, 12 Civ. Pro. Rep. 288.)

VANN, J.: On the 15th of May, 1896, the defendant Emil Schiellien borrowed \$2,200 of the plaintiff, and to secure the payment thereof gave him a chattel mortgage upon his furniture and bar fixtures, "together with all" his "right, title and interest to a license to sell beer or to a renewal thereof." On the 23rd of June, 1896, Schiellien obtained from the defendant Henry W. Michell, who was then special deputy commissioner of excise for the county of Kings, a liquor tax certificate under the Liquor Tax Law, which went into effect on the 23rd of March, 1896. (Laws of 1896, chap. 112, § 45.) When said mortgage was given and until

said certificate was issued, Schiellien had a license to traffic in liquors issued under the old law by the excise commissioners of Kings county, which was recognized as valid by the new law until June 30th, 1896, when it was to become void. (§ 4.) September 29th, 1896, in an action in the Supreme Court, the defendants Welz and Zerweck recovered judgment against Schiellien for the sum of \$646.13, and on the 1st of October following they caused an execution to be issued thereon against his property to the defendant Buttlng, who was then sheriff of Kings county. Two weeks later the sheriff served a notice on said Michell, as special deputy excise commissioner, stating that by virtue of said execution he had levied "upon all the leviable right, title and interest that the above defendant had on the 1st day of October, 1896, or at any time thereafter, in whose hands soever the same may be of, in and to a liquor tax certificate now in your possession. You will hold the same till further ordered by the sheriff of Kings county." Nothing further was done toward making a levy upon the certificate, which was never in the possession or sight of the sheriff, but was in the possession of Schiellien from the time it was issued until October 31, 1896, when he surrendered it to the special deputy excise commissioner, who, not having the money on hand to pay the rebate due according to law, issued a "surrender receipt," which, after describing the certificate, stated that there was a *pro rata* rebate of \$325 due for the unexpired period, "payable from any excise money hereafter received from said city or town or in any other manner hereafter legalized." On the 2nd of January, 1897, Schiellien assigned to the plaintiff his right to the \$325 mentioned in the receipt by a writing indorsed on the back thereof and delivered therewith. When said attempt to levy was made, the liquor tax certificate was not in the possession of the commissioner and had not then been surrendered for cancellation. No money was exposed to the sheriff, nor was anything taken into custody by him.

As both the plaintiff and the judgment creditors claimed said sum of \$325, the commissioner refused to pay it to either, whereupon this action was brought to secure an adjudication that it belonged to the plaintiff; that the defendants had no right thereto, and that the plaintiff should have judgment therefor against the commissioner. The trial court rendered judgment for the plaintiff accordingly, the Appellate Division affirmed unanimously and the judgment creditors come here.

The plaintiff acquired no right, at law, to the liquor tax certificate by virtue of his chattel mortgage, because the certificate was not in existence when the mortgage was given and such an instrument is not a chattel and may not be mortgaged. (*Niles v. Mathusa*, 162 N. Y. 546, 551; *Jones Chat. Mort.* [4th ed.] § 138; *Pingrey on Chat. Mort.* § 211; *Herman on Chat. Mort.* § 46.) The mortgage, however, was good in equity as a contract to assign the new certificate, when acquired, because there was a transfer of the existing license and any "renewal thereof," which necessarily referred to the only renewal that was possible under the law as it existed when the mortgage was given. (*Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Kribbs v. Alford*, 120 N. Y. 519, 524.)

The judgment creditors and their representative, the sheriff, took nothing by virtue of the execution and the attempt to levy thereunder, because a liquor tax certificate is not subject to levy and sale under execution, at least unless a warrant of attachment has been issued and a levy made by virtue thereof. (Code Civ. Pro. § 648.) It is a mere chose in action which is incapable of seizure or delivery by the sheriff. (*Bogert v. Perry*, 17 Johns. 351; *Clark v. Warren*, 7 Lans. 180.) It does not come within the description of "personal property bound by execution" as laid down in section 1405 of the Code of Civil Procedure, which provides that "the goods and chattels of a judgment debtor * * * and his other personal property, which is expressly declared by law, to be subject to levy by virtue of an execution, are * * * bound by the execution, from the time of the delivery thereof to the proper officer, to be executed; but not before." While the certificate was personal property, it was not a chattel, but an intangible right. (*Niles v. Mathusa*, *supra*.) Clearly it was not current money, which is covered by section 1410, nor was it such an evidence of debt as is described in section 1411, because it was not "issued by a moneyed corporation to circulate as money," and although it was issued pursuant to public authority it was not "in terms negotiable or payable to the bearer or holder." While a certificate is assignable it is not negotiable for it is a mere receipt for so much money paid "for excise tax on the business of trafficking in liquors" at a designated place. (Laws of 1896, chap. 112, § 20.) It is not even assignable without restriction, but only upon the condition that the proposed assignee is eligible under the statute to "carry on the business for which such liquor tax certificate was

issued upon the premises described therein." (Id. § 27.) Furthermore, the assignee is required to make a new application, give a new bond and obtain consent to the transfer from the officer who issued the certificate. (Id.) Our attention has been called to no provision of law which makes such a certificate subject to levy by virtue of an execution issued without the aid of a previous attachment. The judgment creditors, therefore, acquired no lien upon the certificate through their execution and the proceedings thereunder. In order to obtain a lien thereon so as to test the good faith of the mortgage, or the transfer by virtue of the mortgage, they should have resorted to proceedings supplementary to execution or to a creditor's action. (Code Civ. Pro. §§ 1871, 2441, 2447.)

The plaintiff had no adequate remedy at law, because his right to the certificate, so far as it rested upon the chattel mortgage, was good only in equity and he was not obliged to rely solely upon the assignment made after the execution was issued and claims had been asserted by virtue thereof.

Whether an action either at law or in equity would lie against a special deputy excise commissioner under the statute as it existed on the 27th of January, 1897, when this action was commenced to recover the rebate due upon surrender of a certificate, is not decided, for that officer has not appealed to this court. (§ 25; *People ex rel. Miller v. Lyman*, 156 N. Y. 407.)

We find no error in the record before us, and the judgment appealed from must, therefore, be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN and LANDON, JJ., concur; BARTLETT, J., not sitting.

Judgment affirmed.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
March 18, 1901.

In the Matter of the Petition of HENRY H. LYMAN to Revoke the
Liquor Tax Certificate of SCHRAKE & RISTEDT.

TRUAX, J. There is enough evidence without the evidence which the defendants have moved to strike out to warrant the finding of the referee. This evidence, however, was competent for the purpose of affecting the weight of the testimony of the defendants'

witnesses (*Moremus v. Crawford*, 51 Hun, 89). The license was the property of the firm, and on the death of one of the firm it went to the surviving member of the firm as survivor. The report of the referee is confirmed.

Settle order on notice.

Supreme Court, New York Special Term, March, 1901. Reported.
34 Misc. 296.

Matter of the Application of HENRY H. LYMAN, as State Commissioner of Excise, etc., for an Order Revoking and Cancelling Liquor Tax Certificate, No. 10,754, Issued to BARTHOLOMEW J. CLANCY.

Liquor Tax Law—Revocation of certificate for false statements as to consents.

A liquor tax certificate must be revoked where there have been false material representations, in the application statement upon which the certificate was issued, in regard to consents by owners of buildings occupied exclusively as dwellings within the statutory radius of two hundred feet.

APPLICATION under the Liquor Tax Law to revoke and cancel a liquor tax certificate.

H. H. Kellogg, for petitioner.

Charles L. Hoffman, for respondent Clancy.

FITZGERALD, J. This is an application by the State Commissioner of Excise to cancel and revoke liquor tax certificate No. 10,754, issued to Bartholomew J. Clancy, to traffic in liquors at No. 892 Columbus avenue, borough of Manhattan, city of New York, by George Hilliard, deputy commissioner of excise, on the ground that the statement presented by the respondent for a liquor tax certificate, verified April 17, 1900, was false and untrue as to certain material statements made therein, as appears by his answers to the following questions: *First. Q.* "How many buildings occupied exclusively as dwellings are there, the nearest entrance to which is within two hundred feet, measured in a straight line, of the nearest entrance to the premises which the traffic in liquors is intended to be carried? *A.* Five. *Second. Q.* Has the applicant attached hereto the consents required by

section 17 of said law? A. Not required. *Third. Q.* If the applicant relies upon consents given heretofore, in what month and year and upon whose application statement were such consents filed? A. Application statement of B. J. Clancy, filed March 1, 1899. *Fourth. Q.* Do such consents given heretofore, together with those filed herewith, cover and relate to two-thirds of the above dwellings? A. Yes." In the statements for liquor tax certificate, verified by respondent February 21, 1899, the following appears: *Q.* "16. How many buildings occupied exclusively as dwellings are there, the nearest entrance to which is within two hundred feet, measured in a straight line, of the nearest entrance to the premises where the traffic in liquors is intended to be carried on? A. Four. *Q.* 17. State the street number and name of owner or owners of each of such dwellings separately. A. A. W. Weaber, owner of dwelling No. 128 on West One Hundred and Fourth street; Caroline W. Hoehle, owner of dwelling No. 116 on West One Hundred and Fourth street; Philip Hausman, owner of dwelling No. 107 on West One Hundred and Fourth street; Mrs. Thompson, owner of dwelling No. 103 on West One Hundred and Fourth street." The consents of A. W. Weaber, Caroline W. Hoehle and Philip Hausman, duly acknowledged February 24, 1899, were attached to the said statement. The petition to revoke and cancel said certificate was duly presented to the court, and referred to a referee to take proof in relation thereto, and report the evidence to the court. From the voluminous record of testimony submitted by the referee, it appears that the houses numbered 79, 81, 83, 103, 105, 107, 109, 110, 112, 114, 116, 118 and 119 West One Hundred and Fourth street are within two hundred feet of the store on the southwest corner of One Hundred and Fourth street and Columbus avenue, and that No. 128 West One Hundred and Fourth street is more than two hundred feet from the said store. The testimony further shows that on February 21, 1899, numbers 79, 81, 103, 105, 107 and 116 West One Hundred and Fourth street were occupied exclusively as dwellings, and that the owners of numbers 107 and 116 West One Hundred and Fourth street consented that the traffic in liquors be carried on on the premises No. 892 Columbus avenue, and that the owners of 79, 81, 103 and 105 West One Hundred and Fourth street had not consented in writing, in the manner prescribed by the statute, to the traffic in liquors at the place above mentioned. Subdivision 8 of section 17 of the Liquor Tax

Law provides in part that "When the nearest entrance to the premises described in such statement in which traffic in liquors is to be carried on is within two hundred feet, measured in a straight line, of the nearest entrance to a building occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by the owner or owners or by the duly authorized agent or agents of such owner or owners of at least two-thirds of the total number of such buildings within two hundred feet, so occupied as dwellings and acknowledged as are deeds entitled to be recorded." The original statement, verified February 21, 1899, shows that only two of the owners of buildings occupied exclusively as dwellings, within two hundred feet of the premises situated on the southwest corner of West One Hundred and Fourth street and Columbus avenue, acknowledged their consent in the manner prescribed by statute. Ellen Thompson, whose name appears in the statement referred to above as one of the parties consenting, in her testimony before the referee, states that she did not give her consent to the opening of a saloon on the premises No. 892 Columbus avenue. The relator has failed to establish, by the preponderance of proof, the allegations as to the violation of law referred to in paragraphs 11, 12, 13 and 14 of the petition. Motion to revoke and cancel certificate granted, on the ground of false material representations in the statement upon which the certificate was issued.

Motion granted.

Supreme Court, Kings Special Term, March, 1901. Reported. 34 Misc. 375.

Matter of the Petition of ROBERT SAUNDERSON for an Order Revoking and Cancelling Liquor Tax Certificate No. 7,433, Issued to FREDERICK J. CRANE.

Liquor Tax Law—When rear doors of dwellings are "entrances"—Consents.

Rear doors of dwelling-houses communicating by rear yards with the street are "entrances" of the dwelling-houses within the meaning of the Liquor Tax Law and therefore where they are within 200 feet of the nearest entrance of a place where traffic in liquors is to be carried on, consents of the owners of the dwelling-houses are necessary to the granting of a certificate.

PROCEEDINGS under the Liquor Tax Law, for an order revoking and cancelling a liquor tax certificate.

Frank L. Mayham, for petitioner.

Charles C. Nadal, for defendant.

DICKEY, J. This motion is submitted on an agreed state of facts by which it is admitted among other things, "That both of the rear doors leading from two dwelling-houses into the rear yards are within two hundred feet from the nearest entrance from the hotel and that the said rear doors are approachable through the yard from the street."

The sole question for determination is whether these rear doors are to be regarded as entrances within the meaning of subdivision 8 of section 17 of the Liquor Tax Law. The contention of the owner of the license is that the intent of the Legislature in using the word entrance was to limit its meaning to street entrances to the front of the building and not to include either side or rear entrances.

The clear purport of the 200-foot restriction is to keep drinking places at least that far away from dwellings in residential neighborhoods unless the owners consented to new liquor places starting up.

The use of the word entrance qualified by the words "the nearest" plainly points to the meaning of more than one entrance to buildings used exclusively as dwellings.

The fact that these dwellings have more than one entrance is not peculiar to them, but common to most dwelling-houses. It is, therefore, no strained interpretation to say that the law makers meant to include all entrances front, side, or rear, in their use of "the nearest entrance."

If they had meant the front entrance only it seems to me that they would have said so in plain words instead of using the language they did use which is to be given its ordinary common-sense meaning.

I find it easy to agree with Justice Lambert in his decision in the matter of the petition of Robert Herse for an order revoking liquor tax certificate No. 18,848, in which he revoked a license under a similar state of facts.

Petition granted with costs.

Supreme Court, Oswego Special Term, March, 1901. Reported. 34 Misc. 389.

Matter of the Petition of JOHN HUNTER for an Order Enjoining JAMES M. CAFFREY from Trafficking in Liquors Contrary to the Provisions of the Liquor Tax Law.

Liquor Tax Law—Injunction refused for sale of “beer”—Presumption of innocence.

The court will not enjoin a person, alleged to be trafficking in liquors without having obtained a certificate therefor, from continuing such traffic upon mere proof that he had sold “beer,” without stating the kind of beer, as there is no presumption that the word “beer” means fermented or malt liquor or that it is intoxicating.

Proof that the defendant had made a few sales of intoxicating liquors three months before raises no presumption that he has continued to sell such liquors as against the presumption of innocence which exists in cases where acts are made penal by statute.

PROCEEDINGS under the Liquor Tax Law. Motion to confirm the report of the referee.

G. S. Piper, for petitioner.

F. G. Spencer, for defendant.

WRIGHT, J. The statute provides, that at the time of the presentation of the petition, “if the court is satisfied that such person is unlawfully trafficking in liquor, an order shall be granted enjoining such person from thereafter trafficking,” etc. Liquor Tax Law, § 29.

The term “liquor” is defined as meaning distilled or rectified spirits, wine, fermented or malt liquors. *Id.*, § 2.

The evidence shows that the defendant sold “beer,” but the kind of beer is not stated. The word “beer” may mean malt or fermented liquor, or it may mean the unfermented and unintoxicating extract of various roots or plants. There is no presumption that the word “beer” means fermented or malt liquors, or that it is intoxicating. The burden of proof in that regard is on the petitioner. *Blatz v. Rohrbach*, 116 N. Y. 450.

In this case, therefore, the proof does not establish that any beer was sold in violation of the statute.

The evidence shows that a few sales of intoxicating liquors were made in June, 1900, but the petition was not presented until Sep-

tember. That the defendant violated the statute three months prior to the time of the presentation of the petition fails to establish a violation at the time of that presentation. It is too remote.

The proof of violation should be reasonably near the date when relief is asked. Counsel for the petitioner invokes the principle that a state of things shown to exist is presumed to continue to exist. That principle applies to civil cases. But in cases involving criminal or penal acts, as in this case, that presumption is counter-balanced by the strong presumption in favor of innocence. (*Blatz v. Rohrbach, supra.*)

The violation mentioned may be the basis of a criminal prosecution and punishment, but the remoteness of the evidence fails to establish the necessity of injunctive action by the court.

The motion must be denied, with a trial fee and costs of this motion, and disbursements to be taxed in favor of the defendant.

Motion denied, with costs.

First Appellate Department, March, 1901. Reported. 58 App. Div. 625.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANK BREWERY,
Appellant, v. HENRY H. LYMAN, State Commissioner of Excise,
and Another, Respondents.

Order affirmed, with ten dollars costs and disbursements. No opinion.

Second Appellate Department, March, 1901. Reported. 59 App. Div. 25.

In the Matter of the Application of ELIZA MOULTON, Respondent,
to Revoke and Cancel Liquor Tax Certificate, No. 18,052, Issued
to PASQUALE ACCONCIA, Appellant.

Liquor tax certificate—False statements in the application therefor—If immaterial they do not violate it—Effect of hotel premises, occupied as such March 23, 1896, becoming untenanted for six months.

Untrue statements contained in an application for a liquor tax certificate will not invalidate the certificate issued upon such application, if the applicant would have been entitled to the certificate had he correctly stated the facts; in such a case the false statements are immaterial.

Where the premises for which the certificate is requested were actually occupied as a hotel on the 23d day of March, 1896, the applicant is entitled to the certificate without filing any consents, and it is immaterial whether or not liquors were sold upon the premises before or after the enactment of the Liquor Tax Law.

The mere fact that the hotel was untenanted during a period of some six months does not evince an intention on the part of the owner to abandon the property right secured by the statute of obtaining a liquor tax certificate without filing any consents.

APPEAL by Pasquale Acconcia from an order of the Supreme Court, made at the Kings County Trial Term and entered in the office of the clerk of the county of Westchester on the 14th day of November, 1900, revoking and canceling a liquor certificate granted to him.

Alfred R. Page, for the appellant.

Lincoln G. Backus, for the respondent.

WOODWARD, J.: The petitioner, Eliza Moulton, instituted this proceeding under the provisions of the Liquor Tax Law (Laws of 1896, chap. 112) for the revocation and cancellation of liquor tax certificate No. 18,052, alleging that certain material statements made in the application therefor were false, in that Pasquale Acconcia in "said statement and application alleged that there were no buildings occupied exclusively as dwellings, the nearest entrance to which was within two hundred feet, measured in a straight line, of the nearest entrance to the premises where the traffic in liquors was intended to be carried on, when, as a matter of fact, there are at least three buildings occupied exclusively as dwellings" within that distance, two of which were owned by the petitioner. It was further suggested by the petitioner that the applicant, Pasquale Acconcia, had made a false statement in declaring that "trafficking in liquors was actually and lawfully carried on in said premises on April 30th, 1892, and continuously since, when, as a matter of fact, the trafficking in liquors has only been carried on continuously since May 1st, 1900, there, and that by said Pasquale Acconcia; that for some time prior and up to about the 23d day of October, 1899, trafficking in liquors was carried on in said premises by one Joseph McNamara, but that he on or about October 30th, 1899, voluntarily surrendered up to the said Francis M. Carpenter, treasurer of the county of West-

chester, his said liquor tax certificate, and the same was cancelled," and that "thereafter and from the 23d day of October, 1899, to on or about the 12th day of March, 1900, the said premises were vacant." It also appears that one William Traphagen applied for and received a liquor tax certificate for the premises here involved on the 12th day of March, 1900, but that no liquors were sold under this certificate, nor were any liquors sold upon the premises after the 23d day of October, 1899, until the said Pasquale Acconcia secured the certificate in controversy in April, 1900. The petitioner also alleges that "there is a building occupied exclusively as a church and school within two hundred feet of said premises." The matter was turned over to a referee to take the evidence, and upon his report coming in, the court granted the order canceling and revoking the certificate.

The question presented on this appeal is one of law.

There are no material questions of fact, and we shall not feel called upon to consider the suggestions of counsel in reference to matters outside of the petition. We will assume that a license having been granted for the sale of liquors on these premises under the provisions of the law as it existed prior to the enactment of the Liquor Tax Law in 1896, the trafficking in liquors which was concededly carried on in the premises on the 23d day of March, 1896, was lawful, and the evidence clearly establishes that the premises were actually occupied as a hotel at the time. It is not necessary to constitute a hotel that it should conform to the requirements of subdivision 1 of section 19 of chapter 401 of the Laws of 1892; it was a hotel in the contemplation of the Liquor Tax Law if it was kept open for entertaining strangers or travelers (15 Am. & Eng. Ency. of Law [2d ed.], 766, and authorities there cited), and the question of whether the license granted in 1895, and in force at the time of the enactment of the Liquor Tax Law, was a lawful license is not material to the question now before us. The real question is whether the statements made in the application of Pasquale Acconcia, and which are concededly untrue, are material; whether he would have been entitled to the liquor tax certificate if his answers had correctly stated the facts. If he would, then the statements are not material, and they cannot invalidate his certificate. (*Matter of Kessler*, 163 N. Y. 205, 207.) By the provisions of subdivision 8 of section 17 of the Liquor Tax Law, as amended by Laws of 1897, chapter 312, "when the nearest entrance to the premises described

in said statement as those in which traffic in liquor is to be carried on is within two hundred feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling," it is necessary to file the consents in writing of at least two-thirds of the owners of such building or buildings, but it is provided that "such consents shall not be required in cases where such traffic in liquor was actually lawfully carried on in said premises so described in said statement on the twenty-third day of March, eighteen hundred and ninety-six, nor shall such consent be required for any place described in said statement which was occupied as a hotel on said last mentioned date, notwithstanding such traffic in liquors was not then carried on thereat." If it be conceded that the license granted in 1895 by the local board of excise was not legal (and the presumption must always be that public officials have done their duty), there is no question that the premises described in the application for the certificate were actually occupied as a hotel at the time the Liquor Tax Law went into effect, and it was not necessary to have the consents required by the provision of the statute above quoted. It is obvious, therefore, that if the applicant had stated that there were buildings used as residences or as churches and schoolhouses within the prohibited distance, it would not have affected his right to the liquor tax certificate, and the statement, whether true or false, was utterly immaterial. (*Matter of Hawkins*, 165 N. Y. 188, 192.) It is proper to state, however, that the case last mentioned was decided by the Court of Appeals subsequent to the time when the learned court at Special Term made the order now under review.

But it is insisted that the trafficking in liquors was suspended upon these premises from the 23d day of October, 1899, to about the 15th day of May, 1900, and that the statement of the applicant that "trafficking in liquors was actually and lawfully carried on in said premises on April 30th, 1892, and continuously since," being untrue, was a material misstatement of the facts warranting the order granted by the court below. It appears from the evidence that the premises described had been used as a hotel for a series of years; that the building was constructed ten or twelve years before the hearing, and had been used as such up to about the 23d day of October, 1899, when the tenant, Joseph McNamara, was dispossessed for the non-payment of rent. The property belonged to the Traphagen estate at that time, and was subsequently sold to

one Peter Cunneen. In the meantime one William Traphagen took out a liquor tax certificate on the 12th of March, 1900, and without opening the place, assigned the same to Pasquale Acconcia on the 26th of April, 1900. The latter, after making repairs, opened the place on the 15th day of May, 1900, under the certificate which was subsequently revoked by the order appealed from. There seems to be no doubt that the statement of Acconcia, that the premises had been used for trafficking in liquors since April, 1892, was made in good faith; that he believed that this was a substantially true statement of the facts, he having come into possession while the tax certificate issued to William Traphagen was in force, and resuming the business as soon as necessary repairs were made. But whether the statement was true or false, it does not affect the right of the appellant to the certificate here involved. The premises were actually occupied as a hotel on the 23d day of March, 1896, and the place in question was expressly excepted from the provisions of the law which required consents to be filed. If there had been no liquors sold upon the premises at any time, either before or after the enactment of the Liquor Tax Law, the applicant would have been entitled to the certificate without filing consents, and the question of whether liquors had been continuously sold upon the premises was not of the slightest consequence. The Court of Appeals in *Matter of Hawkins* (*supra*) goes so far as to hold that where the premises were actually occupied for the purpose of lawfully trafficking in liquors on the 23d day of March, 1896, "it is not necessary that it should have been continuous down to the time of the filing of the application for a certificate," and points out that "the word 'continuously,' which is used in the same subdivision, refers to a case where consents are necessary for other places, and having been once obtained and filed, are preserved and kept in force so long as the place shall be continuously occupied for the traffic."

The court further declares, in the same case, that "we do not intend to hold that the privilege conferred by the statute, which secures to the property owner a right to the certificate without consents, as to places of this character, may not be lost or abandoned by the intentional act of the owner of the property," but it indicates that the intention must be clearly established that the "owner intended to discontinue the liquor traffic at the place." There is no doubt that if the owner of the premises here involved had abandoned it as a hotel, and had put in a stock of groceries

or a grist mill, it would so far have lost its character as a hotel as to come within the general rule laid down by the statute; but the mere fact that the premises were without a tenant during a period of several months evidences no intention on the part of the owners to abandon the property right secured by the statute, and a mistake on the part of the applicant, on a question which did not affect his right to the certificate, is of no consequence.

It is not alleged in the petition that any false statement was made in reference to a church or schoolhouse, and, if there had been, it is governed by the same rules as to dwellings, the exceptions being the same in effect.

The order appealed from should be reversed, and the proceeding dismissed, with costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and proceeding dismissed.

Second Appellate Department, March, 1901. Reported. 59 App. Div. 172.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* MICHAEL SEITZ, Appellant, *v.* HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent.

Liquor tax certificate—A rebate not allowed when an indictment is pending for a violation of the law under another certificate.

Under section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), relating to the surrender of liquor tax certificates and the payment of rebates thereon, an assignee of a certificate who has surrendered the same is not entitled to the payment of the rebate due thereon if there is pending, undetermined, an indictment against the person to whom the certificate was issued for a violation of the Liquor Tax Law while trafficking in liquors under another certificate.

APPEAL by the relator, Michael Seitz, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 16th day of August, 1900, denying his motion for an alternative writ of mandamus directed to Henry H. Lyman, as State Com-

missioner of Excise, requiring him to prepare two orders for the payment to the relator of a rebate on a liquor tax certificate.

John A. Kamping, for the appellant.

P. W. Cullinan, for the respondent.

SEWELL, J. On or about the 29th day of April, 1898, a liquor tax certificate was issued to one John Warnock, authorizing him to traffic in liquors at 411 Hamilton avenue, Brooklyn. Thereafter the said Warnock assigned the certificate to the relator, who surrendered the same and demanded payment of the rebate claimed to be due thereon. The State Commissioner declined to issue an order for the payment of the rebate on the ground that Warnock had been arrested and indicted for a violation of the Liquor Tax Law, and that such indictment was pending and undetermined.

Section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), which relates to the surrender of certificates and the payment of rebates, provides that "If a corporation, association, copartnership or person holding a liquor tax certificate and authorized to sell liquors under the provisions of this act, against which or whom no complaint, prosecution or action is pending on account of any violation thereof, shall voluntarily and before arrest or indictment for a violation of the liquor tax law, cease to traffic in liquors during the term for which the tax is paid under such certificate, such corporation, association, copartnership or person, or their duly authorized attorney, may surrender such tax certificate to the officer who issued the same or to his successor in office * * * and at the same time shall present to such officer a verified petition setting forth all facts required to be shown upon such application."

The statute then directs the officer to compute the rebate, execute duplicate receipts and deliver one to the person entitled thereto, and to transmit the other, with the surrendered certificate and the petition for cancellation to the Commissioner of Excise, and further provides that "If within thirty days from the date of the receipt of such certificate by the State Commissioner of Excise, the person surrendering such certificate shall be arrested or indicted for a violation of the liquor tax law, or proceedings shall be instituted for the cancellation of such certificate, or an

action shall be commenced against him for penalties, such petition shall not be granted until the final determination of such proceedings or action, and if the said petitioner be convicted or said action or proceedings be determined against him, said certificate shall be cancelled and all rebate thereon shall be forfeited."

It appears by the petition in this proceeding that on the 9th day of April, 1897, the said John Warnock was arrested and indicted for an alleged violation of the Liquor Tax Law on the 3d day of May, 1896, while trafficking in liquors at 89 Prospect avenue under another certificate; but it also set forth that at the time of the surrender of the certificate by the relator and the presentation of the petition no complaint, prosecution or action was pending, on account of any violation of the Liquor Tax Law, against the said John Warnock on account of or for the period covered by the certificate surrendered, nor on account of any violation which occurred upon the premises No. 411 Hamilton avenue.

It must be conceded that the relator took the certificate subject to all the conditions which attended the ownership of his assignor (*Matter of Mitchell*, 41 App. Div. 271), and the question is, therefore, presented whether a person who has been arrested and indicted for a violation of the statute while trafficking in liquors under one certificate is entitled to a rebate upon the surrender of a subsequent certificate before the final determination of the indictment.

The privilege conferred by the certificate is a property right, but it is subject to restrictions and conditions, and is one the holder can forfeit. (*Matter of Lyman*, 160 N. Y. 96.) Section 34 of the act (as amd. by Laws of 1897, chap. 312) defines the cases when the certificate is forfeited and provides that upon a conviction for a violation of the provisions of this act the holder of the certificate shall be punished by fine or imprisonment, and in addition thereto shall forfeit the liquor tax certificate and be deprived of all rights and privileges thereunder, and of any right to a rebate of any portion of the tax paid thereon.

Section 42 provides that "If judgment be recovered against the holder of a liquor tax certificate in any action for penalties, such judgment shall provide, in addition to the penalties included therein, that such certificate and all rights thereunder of the holder thereof, including all rebate moneys upon cancellation, be forfeited."

From these provisions of the statute it will be observed that a forfeiture of the certificate and of the right to a rebate follows the judgment as part of the penalty for any infraction of the law, and that this forfeiture is no more restricted or limited to the term of the certificate than the fine and imprisonment.

The violation of the statute is the ground for an indictment and an action, and it is quite clear that the Legislature intended that a judgment should be operative after another certificate has been issued.

Section 25, permitting a person against whom no complaint, prosecution or action is pending, to surrender his certificate and obtain a rebate before arrest and indictment, is in harmony with the plain intention of the Legislature to secure a proper observance of the provisions of the law as expressed in these sections providing for penalties and forfeitures. The language of this section is unmistakable. It only permits the holder of a liquor tax certificate against whom no complaint, prosecution or action is pending, to surrender it and obtain a rebate, and it in terms provides that this must be before arrest or indictment.

The learned judge was clearly right in his view of this question. This disability is not confined by the statute to a violation during the term of the certificate to be surrendered, and a surrender or rebate can be applied for only upon a petition showing that no complaint, action or prosecution based upon any violation of the statute is pending.

The order appealed from was right and should be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Second Appellate Department, March, 1901. Reported. 59 App. Div. 217.

In the Matter of the Petition of HENRY H. LYMAN, State Commissioner of Excise, Respondent, for an Order Revoking and Canceling Liquor Tax Certificates Issued to WILLIAM TEXTER, Appellant.

Liquor tax certificate—It may be canceled because of a violation of the Liquor Law at another place—A previous conviction is unnecessary—It may be forfeited in a summary proceeding—No right to a jury trial exists.

Where a person, maintaining a picnic ground, secured five liquor tax certificates authorizing him to traffic in liquor in five separate buildings located on the ground, each of which had a separate bar and independent facilities for dispensing liquors, and thereafter surrendered four of the certificates, evidence that after such surrender he continued to traffic in liquors in each of the buildings for which the four surrendered certificates were issued, justifies the cancellation of all five certificates, notwithstanding the fact that the Liquor Tax Law was not violated at the place for which the outstanding certificate was issued.

The right of the holder of the liquor tax certificate to a rebate upon its surrender is not an absolute property right, but a qualified right, which exists only under the conditions specified in the Liquor Tax Law, and a previous conviction for a violation of the Liquor Tax Law is not a prerequisite to a denial of this qualified right.

Proceedings for the cancellation of a liquor tax certificate do not require a jury trial.

Section 18 of the Liquor Tax Law, authorizing the Commissioner of Excise to proceed upon the bond without previous prosecution or conviction for a violation of the Liquor Tax Law, does not establish that it was the intent of the Legislature that a liquor tax certificate could not be forfeited in a summary proceeding, in the absence of a conviction for a violation of the Liquor Tax Law.

APPEAL by William Texter from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 7th day of September, 1900, revoking and canceling five liquor tax certificates issued to him under subdivision 1 of section 11 of the Liquor Tax Law.

Hugo Hirsh, for the appellant.

Royal R. Scott, for the respondent.

JENKS, J.: Four of the five certificates in question in this proceeding were issued for terms beginning respectively on June

1, 1900. On September 1, 1900, these four were delivered to the special deputy commissioner of excise for Kings county for surrender and rebate. Of these No. 10,551 was issued for "Ulmer Park Pier, Ulmer Park, Brooklyn"; No. 10,552 was issued for "Main Pavilion Annex Hotel, foot of 25th Avenue, Ulmer Park, Brooklyn"; No. 10,553 was issued for "Bowling Alley, 25th Avenue, near Bay 38th street, Ulmer Park, Brooklyn"; No. 10,554 was issued for "Hotel and picnic grounds, foot of 25th Avenue, between Bay 38th and 40th streets, Ulmer Park, Brooklyn." The certificate not surrendered, No. 10,375, was issued for "S. W. of Harway Avenue, between Bay 38th and Bay 40th streets, Ulmer Park, Brooklyn." Ulmer Park is a picnic ground, or open air pleasure resort, of about two acres, lying between Harway avenue, the ocean, Bay Thirty-eighth street and Bay Fortieth street. Twenty-fifth avenue runs through it, and either side of the park is fenced in. The special agents who went there after September second and in that month before the twenty-fifth thereof, found that the "bowling alley" was a separate inclosed building, with windows and doors, at one end of which was a bar with the "different accompaniments of a bar; a place to draw beer, and other things, such as are usually found in hotels, saloons and bar-rooms," and beer and liquor were served over the bar. "The pier" was 200 or 300 feet distant, and was about 1,600 feet long. At its end was a small frame building and a canopy pavilion where was placed another bar, with "all the appliances of a bar." There was a counter and a buffet containing bottles. The "picnic pavilion" was opposite the bowling alley and 300 or 400 feet from it, inclosed, with a large main floor with glass windows. This also contained a similar but larger bar "with all the necessary paraphernalia for drawing beer and serving liquors," and people were served therefrom. There was still another large rectangular building between the bowling alley and the pier, with a long bar, inclosed by a partition and with doors, and liquor was served therefrom. There was also a hotel near Harway avenue and some 700 or 800 feet from the bowling alley, with a similar bar. Beer and whiskey were served over all these bars at these different places. One of the applicant's witnesses testified that the licensee, some time after November 25, 1899, told him that he had five certificates for various places in Ulmer Park; that he had surrendered four of them about September 1, 1899; that he still retained one; that the nature of his business was such that he

required only one, and on that he was doing all that he should be required to do in keeping one the whole year and the other four for the busy season or picnic season. The licensee also said that he had been in control and that he did control Ulmer Park since the time prior to the 1st of May, 1899; employed the various persons there; that they were all his employees, and that whatever liquor was sold was sold for him by his employees. This conversation was not denied.

Subdivision 6, section 11 of the law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312) provides: "If there be more than one bar, room or place on the premises * * * at which the traffic in liquors is carried on under any subdivision of this section, a like additional tax is assessed for each such additional bar, room or place." The testimony shows that there were five different bars in so many separate buildings, each independent of the others in its capacity to dispense liquors. In *Matter of Lyman* (40 App. Div. 46; affd., 160 N. Y. 96) we said, per CULLEN, J.: "We concede that, under the law, if a second barroom, or place distinctively for the sale of liquor, is maintained, an additional tax certificate must be taken out to cover it." In that case we simply decided that beer, wine or liquor might be served outside of the barroom where but a single barroom or place of that character was maintained, inasmuch as such a practice seemed to be contemplated by the statute itself. A sale made after the surrender of a certificate is illegal, proceedings brought within thirty days cancel the certificate, and any rebate thereon is forfeited. (Liquor Tax Law [as amd. by Laws of 1897, chap. 312], § 28, subd. 2; *Matter of Mitchell*, 41 App. Div. 271.)

But the learned counsel for the appellant contends that a previous conviction for a violation of the Liquor Tax Law must be proven before a certificate can be canceled. In *Matter of Lyman* (160 N. Y. 96, 101), *semble*, that a conviction was prerequisite. But on motion for reargument (161 N. Y. 119) the court said that the specific point must be regarded as still open, and that it would not regard itself concluded by any statement in the original opinion. In *Matter of Livingston* (24 App. Div. 51), in answer to the contention that before the applicant could be deprived of his certificate he was entitled to trial by jury under the Constitution, since the certificate was property of which he could not be deprived without due process of law, the court said: "We have held that these certificates are property. (*People v.*

Durante, 19 App. Div. 292.) They were made such by virtue of the provisions of the Liquor Tax Law, but the Legislature which gave the certificate the character of property had power to, and did by the same act, provide both for their issuance and cancellation, and under what circumstances they should be valid, and when and how they might be revoked. The character given them as property was subject to all these provisions attached to them when they were created. Applicants take them with all the privileges and subject to all the burdens imposed upon them by the Liquor Tax Law." This excerpt was cited in *Matter of Lyman* (46 App. Div. 387) where the contention that the liquor tax certificate was property which could not be taken away in a summary proceeding and that there must be a trial by jury, was fully discussed in a learned opinion by HARDIN, P. J., who had before him both the decision in 160 New York and the opinion of the court on the motion for reargument, reported in 161 New York (*supra*). *Matter of Campbell* (46 App. Div. 634), which was decided on the opinion in *Matter of Lyman* (46 App. Div. 387), was affirmed on the opinion of the court below (162 N. Y. 612). The learned counsel for the appellant calls attention to the fact that the question determined in the latter case was that defendant was not entitled to trial by jury; but he overlooks the fact that the position taken by the licensee was based upon the ground that the certificate represented property, and that, therefore, a summary proceeding was unlawful for the reason that a property right was affected. The learned counsel also points out that *Matter of Lyman* (160 N. Y. 96) was followed by this court in *Matter of Lyman* (60 N. Y. Supp. 805; S. C., 44 App. Div. 507). Examination of our opinion shows that the court held itself concluded by the Court of Appeals decision, which, as I have shown, was modified by that of 161 New York (*supra*). *Matter of Halbran* (63 N. Y. Supp. 1026) did not touch this question, and in its opinion the court simply stated what had been decided by the Court of Appeals (160 N. Y. 96.) It is true that it is now held that the certificate constitutes a contract between the person who receives it and the State, for the absolute right to traffic in liquors for a year, of which he can only be deprived by some violation of the law, so long as the statute is in force, and that such right may be regarded in a sense as property of the holder. (*Matter of Hiliard*, 25 App. Div. 222, 225; *affd.*, 155 N. Y. 702.) But it is a contract that can be canceled and the rights thereunder forfeited,

for a violation of the law. (Ibid.) The precise question before us, however, is limited to the rebate. This is not a return of the tax or any part thereof on account of a deprivation by the State of the right. It is the holder who cancels his contract and surrenders his right. The State says to him, in effect, if you surrender your right, and have not violated this law and do not violate it for thirty days thereafter, you shall receive a rebate. The contract itself gives him no right to rebate, and none is inherent in case he choose not to avail himself of it, while the law affords none save under certain conditions whose fulfillment is entirely in his own hands. Thus it is that the Court of Appeals held in *People ex rel. Miller v. Lyman* (156 N. Y. 407, 411) that the right to rebate is so qualified as not to be absolute. Such a proceeding as the one at bar but cancels the certificate for violation of the law. It does not convict the defendant of any crime, nor does it deprive him of any absolute property right. It but precludes him from maintaining his claim upon throwing up his contract, to that which was made his due solely by a law which provided that he might receive it if he did not violate the provisions thereof. In other words, the vice in the appellant's argument is in his premise that the rebate is an absolute property right in any holder who surrenders the certificate, while the law makes it but a qualified right.

It is well settled that proceedings for the cancellation of a liquor license do not require a jury trial. (*People ex rel. Presmeyer v. Commissioners of Police*, 59 N. Y. 92; *People ex rel. Beller v. Wright*, 3 Hun, 306; *People ex rel. Kimball v. Haughton*, 41 id. 558; *People v. Meyers*, 95 N. Y. 223.) The learned counsel for the appellant contends that inasmuch as section 18 of the law (as amd. by Laws of 1897, chap. 312) provides that the Commissioner of Excise may at any time, without previous prosecution or conviction for violation of any provision of the law, proceed upon the bond, that the intent of the act is that a liquor tax certificate cannot be forfeited in a summary proceeding in the absence of a conviction for a violation of law. The intent and purpose of this provision are adequately discussed and correctly stated in *Lyman v. Rochester Title Ins. Co.* (37 App. Div. 234), and I see nothing in such provisions which makes for the construction contended for. The contention further is that as to two of the certificates the violation of law, if any, was by third parties. The answer of the respondent in the proceedings sets

forth that incidental to his business it was necessary for him to distribute and sell throughout the entire grounds of the park, and for that purpose he maintained at different points places from which, through waiters, he distributed beer and other liquors to guests; and that on the ninth and fourteenth days of September, when it was alleged that he sold liquors in violation of law, there were picnics upon his grounds and distribution of liquor was made at various points. Further, he did not contradict the testimony already alluded to, as to the sales being made for him and by his employees. Before the referee he did testify that he had leased the pier and the bowling alleys to two different persons, that he had no control over the places, and no knowledge of their violation of the law. But these violations were committed at the respective places for which the certificates had been issued. In *Matter of Lyman* (40 App. Div. 46) we said, per CULLEN, J.: "Having permitted the use of the certificate by Stevens for the sale of liquor at the bar, or place specified in the certificate, it may be that, for any infraction of the law there committed, or committed in connection with the business there carried on by Stevens, the company would be responsible." The opinion for affirmance in the Court of Appeals (160 N. Y. 100) contained these words: "There is nothing in the record to show that they intended, or authorized its use in any other than a lawful way. It may be that for any violation of law committed by him at the place designated the company or its property might be responsible." (See, too, *People v. Meyers*, 95 N. Y. 223, 225.) The policy of the law contemplates that the certificate is a privilege to the person named to traffic, at the place named therein; not to that person to traffic at any place or to any other person to traffic at that place. The assignment on September 1, 1899, to the Ulmer Brewery, for rent owed, was not a sale, assignment and transfer contemplated by the act (§ 27) whereby the vendee or assignee acquired the right to traffic in liquors, nor was it attended by the formalities required by the section for that purpose. The only persons who are permitted to surrender a certificate for rebate, under the act, are those who are authorized to sell liquors, and who shall voluntarily cease to traffic thereunder. No valid application could be made for such surrender by the said assignee, save in the name or in behalf of the respondent who had received the certificate. Such assignee, so far as any right to the rebate was concerned, suffered under

the same disabilities as did the holder of the certificate. (*Matter of Michell*, 41 App. Div. 271; *Matter of Lyman*, 56 N. Y. Supp. 1020; S. C., 26 Misc. Rep. 300; *People ex rel. Miller v. Lyman*, *supra*.) The only question presented in *Matter of Lyman (Maloney Certificate)* (53 App. Div. 331), not cited by either counsel, is whether the court lost jurisdiction of the proceeding by extending the return day of the order to show cause from the granting of the original order for the purpose of obtaining service upon Maloney, to whom the certificate was issued, while, in the course of the opinion, the court stated that the assignee's right to rebate depended upon the conditions prescribed by statute, namely, the conduct of the party to whom the certificate is granted during a specified time, viz., thirty days from the receipt of the certificate by the State Commissioner of Excise, and the order of the Special Term directing the revocation and cancellation of the certificate for such violation by Maloney was thereon affirmed. The learned counsel for the appellant would differentiate the case because, he says, the assignments were absolute. That is not the point; the question turns upon the right to apply for and receive the rebate, and the assignment, whatever its character, was not one that in the eye of the law substituted the assignee as one entitled thereby to traffic in liquors, while such an one alone is entitled to proceed for the rebate. (*Ibid.*) It is also urged that, as to the one certificate outstanding, there is no proof of any violation of law by the respondent at the place for which such certificate is issued; but I think the policy of the law is to prohibit him who has violated the law from holding any certificate; not to permit him if he holds, for example, two certificates for different places, to hold his certificate for one place where there is no infraction, no matter how much the law may be broken at the other. The policy of the law deals with the person who vends; there is the personal equation; and the law will not resolve him into dual personalities nor localize his offense. Such, I think, is the construction to be given to section 28, subdivision 2, of the Liquor Tax Law. I see no valid objection to such joinder of proceedings as was had in this case. I find no prohibition against it, while section 42 of the law does authorize that two or more penalties may be sued for in the same action. The violations and acts charged are the same.

I think that the order should be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Third Appellate Department, March, 1901. Reported. 59 App. Div. 346.

In the Matter of the Application of ELMER KRIEGER for a Special Town Meeting in the Town of Prattsville, N. Y., under the Provisions of Section 16 of the Liquor Tax Law.

ELMER KRIEGER, Respondent; JUDSON A. BETTS, County Treasurer of Greene County, Appellant.

Local option—The petition must be filed with the town clerk—If it is not filed in time, a special town meeting can not thereafter be ordered by the court.

Under section 16 of the Liquor Tax Law, requiring the questions affecting local option in a town to be resubmitted to the electors of the town at the town meeting held every second year, the filing in the town clerk's office of the petition mentioned in the section is a condition precedent to the resubmission of the questions.

If the questions were not properly submitted at the biennial town meeting, because of the failure to file such petition in the town clerk's office, the case falls within the exception to section 16 of the Liquor Tax Law, as amended by chapter 367 of the Laws of 1900, and the court has no power to direct the holding of a special town meeting, at which the questions shall be again submitted.

Seemle, that the manifest purpose of the Legislature in requiring the petition to be filed in the office of the town clerk, was to enable that officer to give the notice required by section 34 of the Town Law (Laws of 1890, chap. 569.)

APPEAL by Judson A. Betts, county treasurer of Greene county, from an order of the Supreme Court, made at the Ulster Special Term and entered in the office of the clerk of the county of Greene on the 16th day of July, 1900, directing that a special town meeting be held in the town of Prattsville, Greene county, N. Y., for the purpose of resubmitting to the electors of said town, to be voted on at a special town meeting, the four questions provided by section 16 of the Liquor Tax Law, and directing that the county treasurer cancel of record the certified copy of the statement of result of the vote on said local option questions of the said town of Prattsville, dated November 8, 1899, and filed in the office of the county treasurer on the 11th day of November, 1899.

At a town meeting of the town of Prattsville, held at the time of the general election on November 7, 1899, the four questions specified in section 16 of the Liquor Tax Law (Laws of 1896,

chap. 112, amd. by Laws of 1897, chap. 312; Laws of 1898, chap. 167; Laws of 1899, chaps. 398, 434) were submitted to the electors of the town. A petition, signed by the electors of the town to the number of ten per centum of votes cast at the next preceding general election, requesting such submission, was filed in the office of the clerk of Greene county, but no petition for such submission was filed in the office of the town clerk of the town of Prattsville, nor did the clerk of said town give any notice of the proposed questions and that a vote thereon would be taken by ballot at the town meeting, as required by section 34 of the Town Law (Laws of 1890, chap. 569). A majority of the votes cast on each of the four questions was in the negative. The whole number of ballots cast at said election was 230, of which 36 were blank on the first question, 98 blank on the second question, 101 blank on the third question, and 54 blank on the fourth question.

On May 5, 1900, a petition, signed and acknowledged by at least ten per cent. of the electors who voted at the next preceding general election, was filed in the town clerk's office at Prattsville, requesting the resubmission of the four questions to the electors of the town at a special town meeting thereafter to be held, and thereafter a motion, on notice, was made at a Special Term of this court for an order directing a special town meeting to be held for the purpose of resubmitting to the electors the said four questions and for the cancellation of the certified copy of statement of result of the vote of November 8, 1899, filed in the office of the treasurer of Greene county. From the order granting such motion this appeal is taken.

P. W. Cullinan, for the appellant.

Clarence E. Bloodgood, for the respondent.

EDWARDS, J. The question presented on this appeal is whether the filing in the town clerk's office of the petition required by section 16 of the Liquor Tax Law is indispensable to a submission of the four questions specified in that section to the electors of the town.

This question has been answered in the affirmative in an able and exhaustive opinion of this court in the fourth department. (*Matter of Eggleston*, 51 App. Div. 38.)

Section 16 of the Liquor Tax Law requires the submission of the four questions therein specified to the electors of the town at the first town meeting occurring after March 23, 1896. This provision is clearly mandatory. That section further provides that "The same questions shall be again submitted in the same way at the town meeting held in every second year thereafter, *provided* the electors of the town to the number of ten per centum of votes cast at the next preceding general election shall, by a written petition, signed and acknowledged by such electors before a notary public or other person authorized to take acknowledgments or administer oaths, and filed twenty days before such town meeting with the officer charged with the duty of furnishing ballots for the election, request such submission."

This clearly makes the filing of the petition a condition precedent to the resubmission of those questions.

It was evidently the intention of the statute that at the first town meeting held after the passage of the act the will of the qualified electors of each town should be ascertained upon the four local option questions, and that in every second year thereafter an opportunity should be afforded for the expression of such will, *provided* the petition required by the statute had been duly filed. In the absence of such a petition there can be no valid submission of these questions.

The manifest purpose of the Legislature in requiring the petition to be filed in the office of the clerk of the town was so that officer might give the notice required by section 34 of the Town Law to be given by him, and through such publicity a full expression of the will of the electors might be secured.

The respondent claims that the result of the vote on these questions at the election on November 7, 1899, is indicative of the want of publicity which the statute was designed to give; but whether or not this claim is correct is not here material, as the submission of the questions without the filing of the petition is invalid regardless of the result.

But I am of opinion that the order appealed from was erroneously granted, for the reason that when the application therefor was made section 16 of the Liquor Tax Law had been amended by chapter 367 of the Laws of 1900, which went into effect April 10, 1900. The provision of said section for a special town meeting is as follows: "If for any reason, *except the failure to file any*

petition therefor, the four propositions provided to be submitted herein to the electors of a town shall not have been properly submitted at such biennial town meeting, such propositions shall be submitted at a special town meeting duly called. But a special town meeting shall only be called upon filing with the town clerk the petition aforesaid, and an order of the Supreme or County Court, or a justice or judge thereof, respectively, which shall be granted upon sufficient reason being shown therefor." This was the only authority then existing for an order of the court directing a special town meeting to be held, and it will be observed that this case is within the exception of that provision. Here there was a failure to file a petition in the town clerk's office, and the filing, as herein held by us, in the county clerk's office was a nullity.

The order appealed from should, therefore, be reversed.

All concurred.

Order reversed, with ten dollars costs and disbursements.

Fourth Appellate Department, March, 1901. Reported. 59 App. Div. 440.

In the Matter of the Petition of EDWARD H. ADRIANCE, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 16,158, Issued to WILLIAM G. RAMAGE, Appellant.

Liquor Tax Law—A consent by the owner of a dwelling house may be revoked—Expenditure by the liquor dealer upon the faith thereof.

A consent to the use of premises for the purpose of trafficking in liquor, executed under the Liquor Tax Law (Laws of 1896, chap. 112, § 17, subd. 8, as amended by Laws of 1897, chap. 312), without consideration, by the owner of a dwelling house within 200 feet of such premises, may be revoked at any time before it is presented to, or acted on by, the county treasurer.

The fact that before the consent was revoked, and in reliance thereon, the applicant for the liquor tax certificate expended about \$300 in fitting up the premises for the liquor traffic, does not affect the revocability of the consent.

LAUGHLIN, J., dissented.

APPEAL by William G. Ramage from an order of the County Court of Cayuga county, entered in the office of the clerk of the

county of Cayuga on the 22d day of December, 1900, revoking liquor tax certificate No. 16,158, issued to him.

Frank M. Leary, for the appellant.

Frank D. Wright, for the respondent.

MCLENNAN, J.: The sole question presented by this appeal is whether or not the owner of a building occupied exclusively as a dwelling, situate within 200 feet of the place where it is proposed to carry on the business of trafficking in liquors, who, without any consideration therefor, gives his consent that traffic in liquors be carried on at such place, as provided in subdivision 8, section 17 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), may revoke and cancel such consent at any time before it has been filed with, presented to, or in any manner acted upon by the officer to whom application is made for a certificate authorizing such traffic.

The appellant filled out an application in regular form for a liquor tax certificate, which would authorize him to carry on the business of trafficking in liquors at No. 31 Grant avenue, in the city of Auburn, N. Y., for the term beginning on the 1st day of October, 1900. The application was dated and duly verified on the 13th day of July, 1900. Attached to such application were consents of the owners of buildings occupied exclusively as dwellings, situate within 200 feet of the place where it was proposed to carry on such business. Such consents were in writing, were addressed to the treasurer of the county of Cayuga, and stated that the signers consented that traffic in liquors be carried on in such premises as specified in the application or statement of the appellant. Such consents were also dated on the 13th day of July, 1900, and among the owners of buildings thus consenting was one Maria L. Young, whose consent must be counted to make two-thirds of such owners as required by the statute.

Thereafter, and on the 21st day of July, 1900, said Maria L. Young, by a notice also directed to the county treasurer, which was signed and sealed by her, stated, among other things, as follows:

"WHEREAS, after mature deliberation and consideration, it appears to me that the licensing of said party to sell and retail

liquors at that place is not to be desired, and would be a decided injury to the property and property owners in the locality.

"(I) do hereby revoke, cancel and annul my said consent so heretofore given, and do hereby give notice, to whom it may concern, that I object and oppose the granting and issuing of such license."

Such notice was duly served on the county treasurer and on the appellant on the day it bears date. About two months after service of such notice upon him, and shortly before the 1st day of October, 1900, the appellant presented his application or statement, with the consents of the owners of buildings, including that signed by Maria L. Young, to the county treasurer of Cavuga

county, and obtained the liquor tax certificate in question.

This proceeding was instituted to procure the revocation of such certificate, upon the ground that at the time the appellant presented his application for the same he did not have the legal consent of two-thirds of the owners of the buildings occupied exclusively as dwellings situate within 200 feet of the place in which the business of trafficking in liquors was to be carried on as required by the provisions of the Liquor Tax Law.

Upon the hearing before the county judge the appellant testified that, in reliance upon the consents signed by Maria L. Young and others, he expended about \$300 in making his premises suitable for conducting the saloon business, and it is urged that this circumstance should have influence in determining the appellant's rights.

From the facts above recited it will be seen that the appellant was only misled by the action of Mrs. Young, if at all, for a period of eight days, from July thirteenth when her consent was given, until July twenty-first when she attempted to revoke it, and that application for a certificate was not made by the appellant until two months thereafter.

While we do not think such consideration can have any weight in determining the question of law involved upon this appeal, it is obvious that, by ordinary prudence, the appellant might have fully protected himself against such loss or expenditure. The consent of Maria L. Young was among the last obtained from the owners of buildings, and if he had then presented his application, which was at that time filled out and verified, with such consents, to the county treasurer, and a certificate had been issued to him, concededly no effective revocation of consent could have been made.

It is not necessary, under the Liquor Tax Law, that the term during which traffic in liquors may be carried on shall commence when the certificate is issued, but such certificate, when issued, is required to and does expressly state when the term shall commence, which may be but for a single month prior to the first of May following. If, however, Maria L. Young had a right to revoke her consent before it was presented to the county treasurer, it is of no consequence that the appellant thereby sustained damage.

What is the "consent" which it is urged is irrevocable? It is not a grant of any interest in the real property of Maria L. Young to the appellant. It is not a license authorizing the appellant to in any manner use her property. It is simply a declaration by Mrs. Young, made to the county treasurer, that on the 13th day of July, 1900, she was willing that the appellant, commencing at a future date named, should carry on the business of trafficking in liquors in the city of Auburn, at No. 31 Grant avenue. The statement was true when it was made, but it was not true when it was presented to the treasurer for his official action, to his knowledge. At that time Mrs. Young had changed her mind; had become convinced, for reasons satisfactory to herself, that the carrying on of such business at the place in question would injuriously affect her property, and would be a menace to the other residents in that locality, and, therefore, she withdrew her consent before the time arrived when it could go into effect, and before it was presented to or acted upon by the person to whom it was directed, and protested against the granting of the certificate. Was the county treasurer then bound, or was it permissible for him to still count her as consenting, disregard such protest, and issue a certificate by which he certified in effect that on the 1st day of October, 1900 (the date of the certificate), Mrs. Young was willing that the appellant should carry on the business of trafficking in liquors at the place specified? The certificate speaks as of the time when it is issued. It is of no consequence what the attitude of the property owners was months or years before the application for a liquor tax certificate was presented to and acted upon by the treasurer. The question presented to him was, what was the attitude of the property owners at the time he was called upon to act?

The provisions of the act relating to consents were not enacted for the benefit of persons proposing to engage in the liquor traffic,

but were enacted as an additional protection to the residents of a particular locality; were enacted so that the county treasurer may not, by a certificate issued by him, authorize the establishment of a saloon at a particular place, unless at least two-thirds of the owners of buildings occupied exclusively as dwellings, situate within two hundred feet of such place, are willing and consent thereto, at the time such certificate is issued.

The precise question involved upon this appeal, so far as we have been able to discover, has not been passed upon by the courts of this State, but the revocability of consents, affecting a variety of business enterprises other than that of trafficking in liquors, has been repeatedly considered, and the rule has been invariably adopted that such consents, if given without consideration, unless it is otherwise provided by statute, may be revoked by the person giving them at any time before they are presented to or acted upon by the officer to whom they are directed, and whose action may be influenced or controlled thereby.

In *People ex rel. Irwin v. Sawyer* (52 N. Y. 296) it was held that a taxpayer who had signed a petition directed to the county judge, asking that his town be authorized to issue its bonds in aid of the construction of a proposed railroad, was at liberty to have his name stricken from such petition at any time before the hearing before the county judge was closed, and that to persist in counting the name of such taxpayer as a petitioner for such bonding scheme against his protest was error, and such as to require the reversal of the order made by the county judge.

Judge GROVER, in writing the opinion of the court, said: "This verification speaks as of the time of presenting the petition. This clearly shows that any one signing the petition has an undoubted right to withdraw therefrom before its presentation to the judge. After withdrawing, no one can truthfully swear that he desires to bond the corporation. The petition, so far as the name of any petitioner is concerned, is his paper before presentation to the judge, and he has a perfect right to have his name erased therefrom, and cannot be compelled to go on and become an applicant to the judge for the bonding against his will."

The case of *People ex rel. Yawger v. Allen* (52 N. Y. 538) was a proceeding which arose under section 2, chapter 314 of the Laws of 1869, providing for the bonding of the town of Springport, Cayuga county, to facilitate the construction of the Cayuga Lake railroad, and which act made an affidavit of a majority of the

assessors of the town, to the effect that a majority of the taxpayers owning a majority of the taxable property, had consented thereto, a condition precedent to the issuing of bonds by the town. It appeared that before the assessors made such affidavit, certain taxpayers who had signed consents to bond, signed and acknowledged in the same manner a paper revoking their consent, and requesting the assessors not to include them among the persons consenting. Those revocations were disregarded by the assessors, and they proceeded to make the affidavit required by the statute. It was held that such action was illegal and that the affidavit was void, and the proceedings of the assessors and of the commissioners were reversed.

In the case of *Town of Springport v. Teutonia Savings Bank* (84 N. Y. 403) it was held that where taxpayers had signed consents authorizing the bonding of their town in aid of a railroad, under chapter 314 of the Laws of 1869, a revocation of such consents, delivered to the assessors while those officers had the consents before them and before they had acted upon them or passed upon their sufficiency, was effectual to annul the consents, and the residue of the unrevoked consents being insufficient to constitute the majority required by the statute, the assessors wrongfully made and filed the affidavit, and the condition upon which the power of the railroad commissioners to issue the bonds wholly depended, to wit, the consent of a majority of the taxpayers, was not complied with. The court said, RAPALLO, J., writing the opinion: "The revocations were complete when delivered to the assessors, before they had acted upon the consents. The consents had not been filed when the revocations were delivered, and the filing of the consents after such revocation of them was wrongful. The delivery of the revocations to the assessors was the proper mode of making them effectual, and not the filing of them with the town or county clerk. Their effect was to withdraw from the assessors the authority to make the statutory affidavit and to file it with the consents, thus revoked. On this very ground the proceedings of the assessors in making and filing the affidavit and consents, in disregard of the revocations, were adjudged void and set aside by this court on *certiorari* in the case of *People ex rel. Yarger v. Allen et al., Assessors et al.* (52 N. Y. 538)."

Many other town bonding cases, so called, might be cited, in all of which it was held that a taxpayer who had consented to

such bonding had a right to withdraw or revoke such consent at any time before it was presented to or acted upon by the officer or agent whose action was to be affected or controlled thereby. In none of those cases, and they are numerous, was it suggested that the right of revocation should be denied to a taxpayer because some railroad corporation had relied upon the consent of such taxpayer, and had expended money upon the faith thereof. Indeed, in many of the cases cited the railroads had not only been constructed, but the bonds had been issued, were sold and held by innocent third parties, and yet no court, so far as I have been able to discover, has held that a mere consent before acted upon could not be revoked; or, if so revoked, that any right could be predicated thereon. In some of those cases it was argued that when the assessors came to make the affidavit required under the statute, they were justified in swearing that a majority of the taxpayers of the town wished the town bonded in aid of a railroad, because at some time before they had so stated in a petition signed by them; notwithstanding the fact that such assessors had then before them declarations signed by a majority of such taxpayers that they were then opposed to such bonding scheme, and wished to withdraw their names from the petition signed by them. In others it was argued that the county judge should make an order declaring that a majority of the taxpayers of a town were in favor of bonding it, because at some time in the past they had signed a statement to that effect, notwithstanding the fact that at the time of making such order such taxpayers were before the county judge protesting against and opposing such bonding scheme. In all such cases the courts have held with entire uniformity that the affidavit or order speaks as of the time when made, and should state the fact as it exists at that time.

In *People v. Goodwin* (5 N. Y. 568), which was a proceeding to review the action of referees appointed to hear an appeal from the decision of the commissioners of highways of a town in refusing to lay out a highway, and which involved the right of the owner of the property through which the highway was to run to revoke his consent previously given, it was held that such right to revoke existed until the consent was acted upon and the road laid out. The court said: "The consent necessary to the power of laying out the road must be the consent of the owner at the time of the decision by the referees, or such a consent of the previous owner as binds his successor in the title."

In the case of *Hays v. Jones* (27 Ohio St. 218) it was held that resident landowners who had subscribed a petition praying for an improvement of a highway were at liberty at any time before such improvement was finally ordered to be made by the board of county commissioners to withdraw their consent by remonstrance, or have their names stricken from the petition, and that after such withdrawal such persons could no longer be counted as petitioning for the improvement. (*Bullock v. West Chicago Rapid Transit Co.*, 23 Chic. Leg. N. 147.)

In the case of *McGonnigle v. Arthur* (27 Ohio St. 251) a majority of the landowners whose lands were assessed signed a petition, which was necessary under the statute, for the conversion of a turnpike into a free road, but of the persons who had signed such petition enough changed and signed remonstrances to make a majority of the persons whose lands were assessed opposed to the change in the road. Notwithstanding this fact the commissioners to whom the consents and remonstrances were presented assumed to make an order directing that the turnpike be converted into a free road. It was held that the action of the commissioners was a nullity. The court said, in substance, that at the time the county commissioners made the alleged final order there was a clear want of jurisdiction over the subject-matter, for the reason that a majority of the landowners whose lands were assessed failed to petition for the proposed change, and the action of the commissioners in relation thereto was a nullity.

It had become so well settled that an owner of property abutting upon a street in a city who petitioned for an improvement of such street, as required by many of the city charters, might withdraw from such petition at any time before it was acted upon by the municipal authorities, and thus wholly annul and cancel his former consent, that most of the municipalities of the State have procured amendments to their respective charters which provide, in substance, that no person signing such petition shall be permitted to withdraw his name from the same, or revoke his request or consent until after the expiration of a certain time specified.

We can conceive of no reason why a consent of a property owner that the business of trafficking in liquors be carried on at a particular place should be regarded as more sacred or more binding upon the person consenting than consents such as we have adverted to, and in the absence of a holding to that effect

by the Court of Appeals we are not inclined to make such distinction.

We think the cases cited in support of the proposition that the consent of Mrs. Young was irrevocable are not susceptible of such interpretation.

The case *Matter of Washington Street* (38 N. Y. St. Repr. 346) can have no possible bearing upon the proposition. In that case it was simply held that the fact that two of the petitioners attempted to withdraw their names from the petition *after the commissioners had been appointed* was immaterial.

In the case of *Orcutt v. Reingardt* (46 N. J. Law, 337) it was held: "After the recommendation for license has been presented to the board (excise board) and jurisdiction has been acquired, a signer whose name has not been procured by fraud, cannot, without the consent of the board, withdraw his name and divest the board of jurisdiction."

This case would be analogous to the case at bar if Mrs. Young had sought to revoke her consent after it, with the appellant's application, had been presented to the county treasurer.

In *Sutherland v. McKinney* (146 Ind. 611) certain persons who filed remonstrances against the granting of a license to sell intoxicating liquors attempted to withdraw from such remonstrance, and it was held that such withdrawal could not be made after the beginning of the third day before the meeting of the board of county commissioners. In other words, the court in that case held that such remonstrance, to be effectual, must be made within the time within which the statute states persons are entitled to remonstrate.

In *State v. Gerhardt* (145 Ind. 439) the same proposition of law is stated.

In *City of Buffalo v. Chadeayne* (134 N. Y. 163) it was held that where the common council of the city of Buffalo, by resolution, had given the defendant permission to erect a wooden building upon land owned by him, and he had entered upon the erection of such building, the city could not afterwards, by resolution, revoke such permission, and thus prevent the defendant from completing the building.

In *Hudson Telephone Co. v. Jersey City* (49 N. J. Law, 303) it was held that the common council could not revoke a designation of the streets in which a telegraph company may place its poles, when such company has conformed to the conditions upon which

the designation was made, and has expended money in placing its poles upon the designated streets.

In *Western Union Tel. Co. v. Bullard* (67 Vt. 272) it was simply held that an abutter who has consented to the erection of a line of telegraph poles along the street in front of his premises, cannot revoke such license after the telegraph company has set its poles.

The case of *Cumberland Valley R. R. Co. v. McLanahan* (59 Penn. St. 23) was a case in which a tenant in common conveyed an undivided moiety of his land. A railroad company afterwards erected a warehouse upon it. The other tenant then conveyed his half to the same grantee, reciting that the company had erected the warehouse, and in consideration was to allow a passage over its other land to the land of the grantors, their heirs and assigns. The grantee used the right of way. Held, that it was evidence to the jury of ratification by the grantee of the license to the company, and it was also held that valuable improvements having been made upon the faith of the license, it was not within the Statute of Frauds, and a subsequent ratification by parol was equivalent to precedent authority.

The case of *Wilson v. Chalfant* (15 Ohio, 248) simply holds that a parol license executed is irrevocable.

Hodgson v. Jeffries (52 Ind. 334) simply holds: "A license by the owner of land to the owner of adjoining land to construct and use perpetually a ditch over the land of the former for the purpose of draining the land of the latter, may be verbal, and, upon such construction and continued use, is irrevocable by the grantee of the former, though unforeseen injuries result to the former and his grantee from the construction and use of such drain."

In *House v. Montgomery* (19 Mo. App. 170) the defendant was given permission to go over plaintiff's land, if he would build a quarter of a mile of fence along one side of the way, and also inclose plaintiff's field. The defendant did build the fence, and afterwards, with plaintiff's consent, he planted a hedge fence and cultivated it for years, and used the road across the plaintiff's premises, with his consent, continuously for ten years. It was held that the plaintiff was equitably estopped from prohibiting the defendant from further using such way.

We have thus referred to all the cases cited which it is claimed sustain the proposition contended for by the appellant, and fail to

discover that any of them bear upon or in any manner refer to the questions involved in the case at bar. We conceive of no principle which would justify a holding that a mere consent given without consideration, directed to a public officer, and which is to be made the basis of his official action, should be held to be irrevocable before it is presented to such officer or acted upon by him.

The conclusion is reached that the order appealed from is right and should be affirmed, with costs.

All concurred, except LAUGHLIN, J., dissenting.

LAUGHLIN, J. (dissenting): The sole ground upon which the liquor tax certificate was annulled was that, at the time of filing his petition and obtaining the liquor tax certificate, appellant did not have the requisite consents of the owners of buildings occupied exclusively as dwellings situate within two hundred feet of the premises in which the liquor traffic was to be carried on.

The undisputed evidence on the hearing before the county judge showed that the application for the liquor tax certificate was duly verified by appellant on the 13th day of July, 1900, and that prior thereto he had obtained in due form the necessary consents, which he then had in his possession, of the owners of adjacent buildings required by the statute. Subsequently, and on July 21st one of such consenting property owners, who owned two such buildings within the prescribed territory, filed with the county treasurer and delivered to appellant a notice, directed to them and signed and acknowledged by her, reciting that "after mature deliberation and consideration it appears to me that the licensing of said party to sell and retail liquors at that place is not to be desired, and would be a decided injury to the property and property owners in the locality"; and further stated that she thereby revoked, canceled and annulled her consent theretofore given, and thereby gave notice to whom it might concern that she objected to and opposed the granting and issuing of such license. The consent of this property owner was essential under the statute. Between the thirteenth and twenty-first day of July, relying upon said consents, appellant, who was the owner of the premises and the building in which he contemplated carrying on the liquor traffic, proceeded to remodel the building and furnish the same for saloon purposes at an expense of more than \$300.

He originally intended to open the saloon on the first day of August, as is shown by the recitals in the consents and in the application. Upon being served with this revocation of consent he consulted an attorney and wrote to the Attorney-General for advice in the premises. The Attorney-General referred the matter to the Commissioner of Excise, who, by a written communication, advised appellant that it was the opinion of the excise department that "consents once executed are not revocable, except in case of fraud or mistake, and such fraud or mistake must be judicially established, and the consents thereby secured must be cancelled and annulled by the court before being treated otherwise than as valid by officials charged with the duty of issuing certificate"; and that the county treasurer had no authority to recognize the notice of intent to revoke the consent previously given. The county treasurer, upon application, received similar advice from the excise department. It appears that thereafter, and acting in entire good faith, appellant presented the application and consents to the county treasurer and obtained the liquor tax certificate in question. If under the circumstances, the consenting property owner could thus legally revoke her consent, then the order appealed from is valid, otherwise it is erroneous and must be revoked. It is conceded that if appellant had filed the consents and application on the thirteenth day of July or prior to the twenty-first day of July, the attempted revocation would have been a nullity, but it is contended that until such filing the consenting property owner may revoke his consent at will, and that he cannot be deprived of this right by any expenditure of money or contract made in reliance thereon by the applicant for the liquor tax certificate.

Subdivision 8 of section 17 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), being the provision relating to such consents, provides as follows: "When the nearest entrance to the premises described in said statement as those in which traffic in liquor is to be carried on is within two hundred feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be so filed simultaneously with said statement a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by the owner or owners, or by the duly authorized agent or agents of such owner or owners of at least two-thirds of the total number of such

buildings within two hundred feet so occupied as dwellings, and acknowledged as are deeds entitled to be recorded, except that such consent shall not be required in cases where such traffic in liquor was actually lawfully carried on in said premises so described in said statement on the twenty-third day of March, eighteen hundred and ninety-six, nor shall such consent be required for any place described in said statement which was occupied as a hotel on said last-mentioned date, notwithstanding such traffic in liquors was not then carried on thereat. Whenever the consent required by this section shall have been obtained and filed as herein provided, unless the same be given for a limited term, no further or other consent for trafficking in liquor on such premises shall be required so long as such premises shall be continuously occupied for such traffic."

Section 19 of the Liquor Tax Law originally vested in the county treasurer discretion to inquire into the facts in the application and to refuse to issue the certificate if he found that they did not warrant the issuing thereof. But the section was subsequently amended (Laws of 1897, chap. 312) so that the county treasurer now has no discretion and must issue the certificate if the application in form and in its recitals shows a compliance with the statute. (*People ex rel. Anderson v. Hoag*, 11 App. Div. 74; *People ex rel. Belden Club v. Hilliard*, 28 id. 140.) It thus appears that these consents inure to the benefit of the owner of the premises in which it is intended to carry on the liquor traffic, and that he is entitled as a matter of right to a liquor tax certificate upon the production and filing thereof together with an application in due form with the county treasurer. The statute requires the applicant for a liquor tax certificate to conform to all of the provisions of law entitling him to a certificate at the time of filing his application, and requires that the county treasurer "shall at once prepare and issue" the liquor tax certificate. (Liquor Tax Law, §§ 17-19.)

Where a property owner contemplates using his premises for the liquor traffic, the first thing that it is essential for him to know is whether the owners of neighboring property who have a voice in the matter will give the necessary consents. It would be hazardous for the applicant to incur a large expense in erecting a building for saloon or hotel purposes, or in fitting up his premises for saloon or hotel purposes in advance of obtaining such consents, and it would be unjust to him to be obliged to take out

and pay for the liquor tax certificate long before he would be ready to utilize his premises for the liquor traffic. If a hotel license be desired the building must be ready for the reception of guests before filing the consents or obtaining a certificate. (§ 17, subd. 9; § 31.) The statute should be so construed as to give the appellant a reasonable time, after obtaining and before filing the consents, to construct buildings or to make changes and alterations in his premises preparatory to commencing business and without incurring the risk of having the consents revoked in the meantime. The effect of a transfer of title by one who has given such consent before the same is filed need not now be considered. The property rights of the owners of adjacent premises are not invaded by the opening of a saloon in the neighborhood. The owners of neighboring property have only such voice in the matter as the Legislature has seen fit to confer upon them. Their rights, therefore, are conferred, defined and limited by the statute. The Legislature was not obliged to require that any consents of property owners be obtained as a prerequisite for a liquor tax certificate. As to premises used for liquor traffic at the time of the enactment of the Liquor Tax Law, it was expressly provided that no consents of property owners should be necessary, and the Court of Appeals has recently decided that the right of such owner to continue the liquor traffic on such premises may only be lost by some act on his part indicating an intent to discontinue the liquor traffic. (Liquor Tax Law, § 17, subds. 6, 8; § 24, subd. 2; *Matter of Hawkins*, 165 N. Y. 188, 192.) The purpose of this exemption in favor of premises on which the liquor traffic was at that time conducted, was to protect such property owners as to the money expended in fitting the premises for such traffic. (*People ex rel. Cairns v. Murray*, 148 N. Y. 171, 175.) The same reason exists for protecting a property owner who, after obtaining the statutory consents, has expended money in good faith in preparing to conduct the liquor traffic upon his premises. It has been held that a liquor tax certificate constitutes a species of property, irrevocable, except in the manner and for the causes prescribed by the statute, transferrable by the holder thereof who is entitled to the same protection in its security and enjoyment as the owner of other personal property. (*Matter of Lyman*, 160 N. Y. 96; *Niles v. Mathusa*, 162 id. 548; *Matter of Lyman*, 163 id. 536; *Matter of Kessler*, 163 id. 205.) The only grounds of revocation are (1) material false statements in the

application; (2) that the applicant was not entitled to receive a liquor tax certificate, or (3) is not entitled to hold the same on account of some violation of the law or other cause. (Liquor Tax Law, as amd. by Laws of 1900, chap. 367, § 28, subd. 2.) Here there were no false statements in the application. (*Matter of Lyman*, 163 N. Y. 536.) It was not shown or contended that appellant, after receiving the certificate, violated any law which would justify its forfeiture. Inasmuch as appellant complied with every requirement of the statute, and no provision was made therein for revoking consents, and the county treasurer had no discretion with reference to issuing the liquor tax certificate, it would also seem, at least upon a literal reading of the statute, that he was entitled to receive the certificate at the time it was issued to him. But even if such consents of property owners before being acted upon or filed are revocable at will and without proof of fraud or mistake, which need not now be decided, yet when, as here, the applicant has expended large sums of money in good faith relying upon such consents, they may not be revoked at pleasure without other cause than that the signer has undergone a change of mind on the subject. No provision is made in the Liquor Tax Law for notice to the signers of such consents of the filing thereof with the county treasurer or for a hearing thereon. The privilege of consenting or refusing to consent is personal to the property owner. When, therefore, such consent has been acted upon by the person for whose benefit it was intended, there is no impropriety in holding that it may not be revoked to his prejudice. The consent was unlimited as to the time the liquor traffic was to be carried on, and by the terms of the statute (Liquor Tax Law, § 17, subd. 8) it is not revocable, at least not after having been acted upon, so long as the premises shall be continuously occupied for such traffic. Prior to the attempted revocation of the consents in question appellant had acquired a vested right to apply for and obtain a liquor tax certificate, and he having also made contracts and expended money relying upon such consents and upon his right to a liquor tax certificate, the property owner is estopped from revoking her consent. (*Matter of Washington Street*, 38 N. Y. St. Repr. 346; *Orcutt v. Reingardt*, 46 N. J. L. 337; *Sutherland v. McKinney*, 146 Ind. 611; *State v. Gerhardt*, 145 id. 439; *City of Buffalo v. Chadeayne*, 134 N. Y. 163; *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303; *Western Union Tel. Co. v. Bullard*, 67 Vt. 272; *Cum-*

berland Valley R. R. Co. v. McLanahan, 59 Penn St. 23; *Wilson v. Chalfant*, 15 Ohio, 248; *Hodgson v. Jeffries*, 52 Ind. 334; *House v. Montgomery*, 19 Mo. App. 170.)

I think that the purpose of this provision of the statute and the proceedings required thereunder distinguish this case from the town bonding cases where the consenting and non-consenting property owners were directly affected financially and where it was not contemplated that any rights should become vested or that any action should be taken by interested parties until after the decision made by the assessors or county judge as to the sufficiency of the consents. In these cases a hearing was had before the assessors or county judge, and the matter was considered as a proceeding pending before those officials to determine whether the necessary percentage of the property owners favored bonding the town for the purpose of constructing a railroad. For these reasons it was held that each consenting or petitioning property owner had the right to withdraw his consent at any time before the application or petition was finally acted upon by the assessors or county judge. (*People ex rel. Irwin v. Sawyer*, 52 N. Y. 298; *People ex rel. Yawger v. Allen*, Id. 538; *Town of Springport v. Teutonia Savings Bank*, 84 id. 403; *Cagwin v. Town of Hancock*, 84 id. 532.)

The order should be reversed, with costs to appellant, and the proceeding dismissed, with costs to him also.

Order affirmed, with costs.

Fourth Appellate Department, March, 1901. Reported. 59 App. Div. 626.

In the Matter of the Petition of JOHN HUNTER, Appellant, for an Order Enjoining JAMES M. CAFFREY, Respondent, from Trafficking in Liquors Contrary to the Provisions of the Liquor Tax Law.

Order affirmed, without costs.

All concurred.

Fourth Appellate Department, March, 1901. Reported. 59 App. Div. 626.

In the Matter of the Petition of GERTRUDE A. HAIGHT, Respondent, for an Order Revoking and Cancelling Liquor Tax Certificate No. 24,354, Issued to WARREN J. PARSELL, Appellant.

Order affirmed, with costs, upon the authority of *Matter of Place* (27 App. Div. 561; affd., 156 N. Y. 691).

All concurred.

Court of Appeals. Reported. 166 N. Y. 274.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, v. JOHN M. KURTZ et al., Defendants.

CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, Appellant.

1. Liquor Tax Law—Gambling upon premises—Liability of surety upon bond.

A surety upon the bond required by section 18 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), one of the conditions of which was that the principal would not permit gambling upon the premises, is not relieved from liability for a breach of that condition because of a subsequent provision in the bond that it was "to cover every violation of the Liquor Tax Law" which at the time the bond was given did not prohibit gambling, inasmuch as the parties must have intended that the bond should cover the case of gambling upon the premises as well as any violation of the provisions of the law itself.

2. Certificate holder responsible for conduct of business.

Where a liquor tax certificate has been issued or transferred to a person upon his application and filing of a bond, he is the principal whom the law will look to during the conduct of the business and will hold responsible for compliance with the statutory provisions.

3. Slot machine, when a gambling device.

A slot machine, when a contrivance or apparatus by which it is determined who, as between the player and proprietor, is the winner or loser of money hazarded, is a gambling device.

4. Pleading—Amendment of complaint.

An amendment of the complaint in an action upon the bond, by alleging that the certificate was transferred to the principal instead of issued to him, is properly allowed under section 723 of the Code of Civil Procedure when the surety could in no manner have been prejudiced thereby.

Lyman v. Kurtz, 48 App. Div. 633, affirmed.

(Argued March 11, 1901; decided March 22, 1901.)

APPEAL from a judgment in favor of plaintiff, entered February 23, 1900, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which affirmed an order of the Trial Term denying a motion for a new trial after a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles Van Voorhis for appellant. The complaint does not set forth a cause of action, and error was committed in denying defendant's motion to dismiss it upon that ground. (*Nat. M. B. Assn. v. Conkling*, 90 N. Y. 116; *Ward v. Stahl*, 81 N. Y. 406; *People v. Pennock*, 60 N. Y. 421; *Page v. Krecky*, 137 N. Y. 307; *Magee v. M. L. Ins. Co.*, 92 U. S. 93; *Holmes v. Hubbard*, 60 N. Y. 183; *Hinckley v. Kreitz*, 58 N. Y. 583; *Kellogg v. Stockton*, 29 Penn. St. 460; *Matter of Lyman*, 160 N. Y. 96.) The plaintiff's evidence failed to establish a cause of action. (*People ex rel. v. Lyman*, 156 N. Y. 407; 27 App. Div. 527; *Matter of Lyman*, 26 Misc. Rep. 300; *Matter of Mitchell*, 41 App. Div. 271; *Niles v. Mathusa*, 162 N. Y. 546; 20 App. Div. 483; *Matter of Jenney*, 19 Misc. Rep. 244; *Lyman v. Schermerhorn*, 53 App. Div. 32; *Nat. M. B. Assn. v. Conkling*, 90 N. Y. 116; *People ex rel. v. Higgins*, 151 N. Y. 570; *Sullivan v. Alexander*, 19 Johns. 233; *U. S. v. Tingey*, 5 Pet. 114.) It was error to deny the motion for a nonsuit at the close of the evidence. (*George v. Gobey*, 128 Mass. 289; *Mechem on Agency*, §§ 745, 746.) It was error to permit the plaintiff to amend his complaint upon the trial. Under the allegations of the complaint it was impossible for the plaintiff to make out a cause of action. The amendment made a new cause of action. (*Barnes v. Seligman*, 55 Hun, 339; *Rutty v. C. F. J. Co.*, 52 Hun, 492; *Romeyn v. Sickles*, 108 N. Y. 650.)

Elbridge L. Adams for respondent. The keeping of a slot machine on the licensed premises, which the public might and

did use, was a breach of the condition of the bond against gambling. (*Loiseau v. State*, 114 Ala. 134; *Kohlsorn v. State*, 97 Ga. 343; *Bobel v. People*, 173 Ill. 119; *Lyman v. Brucker*, 42 App. Div. 624.) The appellant surety company is estopped by the recitals in the bond from questioning that John M. Kurtz was the principal for whose good conduct it was bounden. (*Lyman v. R. T. Ins. Co.*, 37 App. Div. 234; *Decker v. Judson*, 16 N. Y. 442; *Harrison v. Wilkin*, 69 N. Y. 413; *Bowne v. Mellor*, 6 Hill, 496; *Burrows v. Turner*, 24 Wend. 275; *Gregory v. Levy*, 12 Barb. 610.) The argument that the bond was intended to cover only violations of the Liquor Tax Law, and that gambling was not a violation of that law as it stood at the time the bond was given, is not sound. (*French v. Carhart*, 1 N. Y. 96; *Schwartz v. Hyman*, 107 N. Y. 562; *White's Bank v. Myles*, 73 N. Y. 235; *Lyman v. R. T. Ins. Co.*, 37 App. Div. 234; *Lyman v. Shen. Social Club*, 39 App. Div. 459.)

GRAY, J. This action was brought by the state commissioner of excise to recover the penalty of a bond; which was executed to the People of the state by the defendant Kurtz, as principal, and by the defendant trust company, as surety. It was given upon the former's application for a liquor tax certificate and was required by the State Liquor Tax Law, in order that the applicant might be authorized to traffic in liquors. (Chap. 312, Laws of 1897, §§ 17, 18.) The recital following the bond, which is in the penal sum of \$1,000, states that the principal is about to apply for a liquor tax certificate for trafficking in liquors, at a place therein designated. Then follows the condition of the bond, which is in the following language: "The condition of this obligation is such that if the said tax certificate applied for, as aforesaid, is given unto the said principal, and the said principal will not, while the business for which such tax certificate is given shall be carried on, suffer or permit any gambling to be done in the place designated by the tax certificate in which the traffic in liquors is to be carried on, * * * or suffer or permit said premises to become disorderly, and will not violate any of the provisions of the liquor tax law, * * * then this obligation shall be void, otherwise it is to be and remain in full force and effect to cover every violation of the liquor tax law and all fines and penalties incurred or imposed thereunder. An action for the breach of any condition of this bond may be maintained without

previous conviction or prosecution for violation of any provision of the liquor tax law." The complaint sets out a breach of the condition of this bond, in that the defendant Kurtz permitted gambling to be done, by maintaining an "electric nickel slot machine" upon the premises. The plaintiff had a verdict upon the trial for the amount of the penalty and there has been an unanimous affirmance by the Appellate Division, in the fourth department. The defendant trust company appeals, further, to this court.

In the effort of the appellant to escape liability as surety upon this bond, it has raised several objections; to a few of which reference will be made. Upon the coming on of the cause for trial, the defendants moved to dismiss the complaint upon the ground, among others, that it did not set forth a cause of action, and, under the exception taken to the denial of that motion, it is argued by the appellant that the bond does not cover the breach sued upon; notwithstanding that it is one of its conditions that the principal will not permit any gambling to be done in the place. The argument is, in substance, that the general terms of the obligation are qualified by the language which concludes the clause containing the condition of the obligation and that, thereby, the bond is so restricted as, only, "to cover every violation of the liquor tax law and all fines and penalties incurred or imposed thereunder." It is argued that, if the appellant's liability as surety is not to be extended beyond the strict terms of the contract, then that is confined to violations of the Liquor Tax Law simply and does not comprehend the condition, for breach of which the suit is brought. The rule of law invoked by the appellant depends for its application upon the ascertainment of the intention of the parties to the instrument; which is to be reached upon a consideration of the whole thereof and with the light of the circumstances under which it was made. If it is manifest that it must have been their intention that their obligation should cover the case of gambling upon the premises, as well as a violation of the Liquor Tax Law provisions, then this subsequent language which is depended upon to qualify the more general terms of the contract, will be inoperative to effect such a result and may be regarded as surplusage; or perhaps, as an unnecessary repetition of the principal feature of the obligation and for the sake of emphasis. While the Liquor Tax Law did not, at the time, prohibit gambling, nevertheless, the legislature required, as

a condition preceding the issuing of the certificate, that a bond should be executed to the People that the applicant would not permit "any gambling to be done in the place designated by the tax certificate in which the traffic in liquors was to be carried on," in addition to agreeing not to violate any of the provisions of the law itself. The object of the legislature, undoubtedly, was that the place, where the liquor business was to be carried on, should not be characterized by unlawful, or disorderly, conduct and, to secure this end, inserted the requirement in question. The parties obligating themselves to the state in pursuance of the statutory provisions, and for the purpose of procuring the issuing of the certificate, will, necessarily, be presumed to have intended to have come under all the conditions expressed in their contract, which were required by the statute. The language relied upon as qualifying the general conditions of the bond is not, necessarily, inconsistent with their full performance and I think the contention of the appellant is not to be sustained.

It is, further, argued that the plaintiff's evidence failed to make out a cause of action and that the denial of the motion for a nonsuit was error. It is said that the evidence did not prove that any legal tax certificate was ever issued, or transferred, to the defendant Kurtz and that, unless that was established, there could be no liability upon the bond. The question was submitted to the jury upon evidence, whether Kurtz took out, or procured, a tax certificate and whether it was for himself, or for another, and the jurors were instructed that the principal question for them to consider was whether Kurtz was carrying on business for himself, or in such way as gave him the control of the premises and the right to remove the machine. The unanimous affirmance by the Appellate Division of the verdict of the jury is conclusive upon the question and placed it beyond our review. Whether Kurtz was carrying on the business for his own account, or for the American Brewing Company, as it is claimed, is of no importance upon the question of liability. When a liquor tax certificate has been issued, or transferred, to a person upon his application and filing of a bond, he is the principal whom the law will look to during the conduct of the business and will hold responsible for compliance with the statutory provisions.

But it is further objected by the appellant that there was no gambling and that the "nickel slot machine" was not a gambling device. The mechanism of this machine is such that when a five-

cent piece is dropped into one of the several slots, representing several colors, a disk is made to revolve on which are painted corresponding colors and when it ceases to revolve, the color upon its face opposite to a finger determines whether the player has won or lost. Each color has a different value, from ten cents up to one dollar, and if the player has won upon the color selected, the sum won is, by a mechanical device, delivered to him in a cup. The evidence shows the machine to be a contrivance, or apparatus, by which it is determined who, as between the player and proprietor, is the winner, or loser, of the money hazarded. The player stakes, or hazards, his money on a chance and that is sufficient to make out the gambling. Within the general understanding such a machine is a gambling device. (See Wharton's *Crim. Law* [10th ed.], § 1465b; *Portis v. State*, 27 Ark. 362; *State v. Grimes*, 49 Minn. 443; *Bobel v. People*, 173 Ill. 20; *Kohlson v. State*, 97 Ga. 343.)

It is further contended by the appellant that it was error to permit the plaintiff to amend his complaint upon the trial. The pleading had alleged that the liquor tax certificate had been issued to the defendant Kurtz; whereas it appeared that he was the transferee of a certificate previously issued to some one else, under section 27 of the Liquor Tax Law. The plaintiff asked to amend the complaint by inserting the words "that the certificate was transferred to him," instead of "that the certificate was issued to him." This was allowed over the objection of the appellant's counsel; the court at the same time, however, allowing the appellant to amend its answer in material respects. Within the rule of the Code, which permits the trial court, upon the trial, in furtherance of justice, and upon such terms as it deems just, to amend a pleading, where the amendment does not change substantially the claim, or defense, by conforming the pleading to the facts proved (*Code of Civ. Pro.* § 723), there was no abuse of the discretion, or power, of the court. There was no material change in the plaintiff's claim and it is inconceivable that the appellant could have been prejudiced. By its previous answer, it was expressly admitted that the defendant Kurtz made an application for a liquor tax certificate and it was, also, expressly admitted that he, with the appellant, as surety, executed and delivered the bond set forth in the complaint as a condition of the county treasurer granting the liquor tax certificate to Kurtz "under duress of being compelled to abandon his said business."

By the amendment of the answer, as permitted upon the trial, these previous admissions were withdrawn and their subject-matter put in issue. Under the circumstances, it is difficult to see how the defendant could, possibly, have been prejudiced, or surprised, by the amendment.

I think none of the other questions presented by the appellant requires any serious consideration and that, therefore, the judgment should be affirmed, with costs.

PARKER, Ch. J., BARTLETT, MARTIN, VANN and CULLEN, JJ., concur; WERNER, J., not sitting.

Judgment affirmed.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
April 16, 1901.

In the Matter of the Petition of CHARLES E. SCHUYLER, to Revoke
the Liquor Tax Certificate of EDWARD WALDRON.

Frank L. Mayham, for petitioner.

C. C. Leverson, for respondent.

TRUAX, J. The sandwiches were not served in good faith as a meal to the witness for the relator. They were not ordered. They were not eaten. The use of the sandwiches was simply an attempt to evade the law.

Motion granted, with costs.

Court of General Sessions, County of New York. Reported. N. Y. L. J.
April 1, 1901.

PEOPLE v. JAMES BARNETT.

McMAHON, J. The defendant herein is charged with the commission of a misdemeanor, namely, the violation of the Liquor Tax Law. On the 13th day of January, 1901, he was held by Magistrate Flammer in \$500 bail to answer said charge in the Court of Special Sessions. He now applies for an order that the

charge against him be transferred to the Court of General Sessions and prosecuted by indictment under section 1406 of the charter of the city of New York.

This section provides that the Courts of Special Sessions of the City of New York shall have, in the first instance, exclusive jurisdiction to hear and determine all charges of misdemeanors committed within the city of New York, except charges of libel. Provided, however, that the same shall be tried in the county wherein such misdemeanors are charged to have been committed. The said courts, however, shall be divested of jurisdiction to proceed with the hearing and determination of any charge or misdemeanor in either of the following cases:

First, if, before the commencement of the trial in said court of any person accused of a misdemeanor, a grand jury shall present an indictment against the same person for the same offense; or

Second, if, before the commencement of any such trial, a justice of the Supreme Court in the judicial department where such trial would be had or, if the charge be triable in the county of New York, the recorder of the county of New York, or a judge authorized to hold a Court of General Sessions of the Peace in and for the county of New York * * * shall certify that it is reasonable that such charge shall be prosecuted by indictment.

No such certificate shall be made, upon the application of a defendant, without at least two days' notice to the district attorney.

Until the adoption in 1870 of the amendment which is known as section 26, article 6, of the Constitution, and embodied in the present Constitution of 1894 (art. 6, § 23), persons charged with misdemeanors were granted trial by jury as a matter of right.

But, since the enactment of the Act of 1892, chapter 601, Laws 1895, and section 1408 of the New York City Charter, trial by jury on a charge of misdemeanor no longer exists as a matter of right. (*People v. Wolff*, 24 Misc. 94; *People v. Levy*, 24 Misc. 469; *People v. Wade*, 26 Misc. 585.)

Legislation under the amendment before referred to, namely, constituting the Courts of Special Sessions without jury, with exclusive jurisdiction to try misdemeanors, has been approved in the following cases: *People v. Dutcher*, 83 N. Y. 240; *People v. Rawson*, 61 Barton, 619; *Devine v. People*, 20 Hun, 98; *People v. The Justices, &c.*, 74 N. Y. 406.

In the case of *The People v. Wade* (*supra*), the learned recorder said: "Where jurisdiction is conferred upon the court, the presumption of law is that it will be properly and justly exercised, and before that presumption can be disturbed it should be made to appear that there exists some cause which is likely to be prejudicial to the rights of the party, or to injuriously affect the fair and impartial administration of justice, or that there are involved exceptional and important questions which, in a trial by indictment, in a court of record, would be simple and proper."

Again, "The matter of transfer is now discretionary and not arbitrary—" (GOFF, R. — *Wade, supra*).

Judge BEEKMAN, in *People v. Levy* (*supra*) defines "reasonable" as follows: "Where facts show * * * that a case is one of exceptional character and that for such special reason the defendant cannot have a fair trial in the Court of Special Sessions, or there are exceptional features in the case which render it desirable and proper that the action should be tried before a jury rather than a justice of the Court of Special Sessions."

In *People v. Wade* it is held that "it is not sufficient to allege that the defendant is not guilty and that he desires the charge to be prosecuted by indictment."

Such transfers have heretofore been made, it is true, and for causes similar to those urged herein in the moving papers, but such transfers were made either with the consent or without the opposition of the learned district attorney.

In the case under consideration, and in a number of others now pending, the district attorney earnestly opposes the transfer and for the following reasons, to wit:

"*First.* The Court of General Sessions should be given to the trial of felonies, in preference to misdemeanors.

"*Second.* The Court of Special Sessions can dispose of these cases more rapidly and expeditiously.

"*Third.* It tends to clog the calendars of the criminal courts of record.

"*Fourth.* It tends to fill the prison with those awaiting trial.

"*Fifth.* It places additional burdens on the now overburdened grand juries.

"*Lastly.* In ways too numerous to mention, it tends to hamper the work of the district attorney and his assistants in the performance of their duties."

In view of these reasons, strenuously urged by the prosecuting

officer, and in the absence of any proof that the rights of the defendant are prejudiced or endangered, or that a fair and impartial administration of justice cannot be had in the Court of Special Sessions, I am constrained, in the exercise of the discretion conferred upon this court, to deny the application in the case at bar, and in each of the following cases where similar motions are pending:

The People v. James Barnett; Same v. Charles T. Brown; Same v. Henry Bruck; Same v. Matthew Burke; Same v. William Barnes; Same v. James Cassidy; Same v. William Chicca; Same v. Hugh Campbell; Same v. William Dowie; Same v. Patrick Duffy; Same v. Morris Dubinsky; Same v. Emanuel De Voe; Same v. Benjamin Emerich; Same v. Frank Flynn; Same v. Richard Fitzpatrick; Same v. Frank Herman; Same v. Joseph Hememding; Same v. August Hildebrandt; Same v. Oscar Hamburger; Same v. Albert Herdtfelder; Same v. Charles Horn; Same v. Isaac Leader; Same v. Thomas Lee; Same v. Albert Lucersson; Same v. Michael J. Lyman; Same v. Thomas J. Moran; Same v. Charles J. Nettel; Same v. Peter Neuer; Same v. Bernard Noonan; Same v. Fritz Prollocks; Same v. Michael Quinn; Same v. Frank Reynolds; Same v. Samuel Rosenthal; Same v. Henry Schwartz; Same v. William Sommer; Same v. Matthew Shanley; Same v. James Tate; Same v. Thomas Tyner; Same v. Thomas Woods; Same v. Herman Weber; Same v. George Zerlman.

Supreme Court, New York Special Term. Reported N. Y. L. J.
April 30, 1901.

PEOPLE ex rel. PATRICK WALSH v. GEORGE HILLIARD, as Special
Deputy Commissioner of Excise.

Kugelman & Kohn, for plaintiff.

H. H. Kellogg, for defendant.

TRUAX, J. Motion granted on the authority of the *Matter of Moulton* (69 N. Y. Supp. 14) and the *Matter of Hawkins* (165 N. Y. 188).

Settle order on notice.

Supreme Court, Erie Special Term, April, 1901. Reported. 34 Misc. 447.

Matter of the Application of MILTON H. COWLES, for an Order
Revoking Liquor Tax Certificate Issued to MICHAEL F.
BERGIN.

**Liquor Tax Law—Owners' consent to traffic for an unlimited term survives
a change of ownership—Form.**

A consent of the original owners of premises to traffic in liquor thereon duly made and filed and given to their tenant for an unlimited term remains effective so long as the premises are continuously occupied by the tenant for such traffic notwithstanding a subsequent change in the ownership of the premises.

One owner, duly authorized by all the owners, may execute a consent which will bind the premises.

APPLICATION to cancel and revoke liquor tax certificate upon ground that the consents of the owners of the premises were not obtained to traffic in liquors.

H. C. Spurr, for petitioner.

Shire & Jellinek, for respondent.

KRUSE, J. In May, 1898, Thomas R. Bullymore, acting for himself and his two associate joint owners of certain premises situate in the city of Buffalo, made a lease thereof to the respondent, Michael F. Bergin, for the term ending May 1, 1903, and about the same time, acting under like authority, consented, in writing, duly acknowledged, to the traffic in liquors on said premises, without limitation of time. This consent was filed July 2, 1898, with the respondent's application to traffic in liquor at these premises, and a liquor tax certificate was issued to him in accordance with the application, and thereafter a like certificate was issued to him on the first day of May in each year, based upon the original consent so filed on the 2d day of July, 1898, and the business has been carried on continuously. The premises were sold by the three owners to Charles A. Weed, the present owner, in February, 1900, at which time the respondent, Michael F. Bergin, was in possession thereof, carrying on the business of trafficking in liquor, under the liquor tax certificate so issued to him on the first day of May preceding, and the deed of conveyance was expressly made subject to the lease under which

Bergin was then occupying said premises. Notwithstanding the change in ownership of the premises in question in February, 1900, the liquor tax certificate was issued in May, 1900, based upon the original consent made in 1898. The petitioner contends that this original consent became ineffectual after a change in ownership of the premises, and that the consent was insufficient even as regards the original owners, it having been made by but one of them, although he was authorized to do so for all of the owners, contending that the authority to make such a consent for the other two original owners not joining therein should be in writing, and in such form as would authorize the making of a contract for the sale of real estate.

--- Last ground it is only necessary to

First. As regards the first ground it is only necessary to say that the Liquor Tax Law does not so require in express terms, and such a consent is neither a conveyance nor lease of real estate, nor a contract for a lease or sale of any interest therein, and it appears that Thomas R. Bullymore not only had charge of this property, but that the other two owners recognized the lease, that the rent was accepted by the owners, and expressly recognized by the present owner, as well as the three original owners, in the deed of conveyance made by them to the present owner.

Second. The other objection urged against the validity of this liquor tax certificate, that the purchaser of these premises who was the owner on the 1st day of May, 1900, when the application was made, and the liquor tax certificate issued to the respondent, did not consent thereto, is based upon subdivision 8 of section 17 of the Liquor Tax Law, which provides that simultaneously with the statement required to be made for the application, there shall also be filed a consent, in writing, by the owner of the premises, or his duly authorized agent, that such traffic in liquors be so carried on in said premises. It is contended by the petitioner that this provision refers to the ownership at the time of the making of the application for the liquor tax certificate, and the issuing thereof. Such claim undoubtedly would be tenable if that provision stood alone, and was absolute and unqualified, but in 1897 an amendment was interpolated in the section of which this subdivision relating to the consent of the owner is a part, which is as follows: "Whenever the consent required by this section shall have been obtained and filed as herein provided, unless the same be given for a limited term, no further or other consent for trafficking in liquor on such premises shall be

required so long as such premises shall be continuously occupied for such traffic." Laws of 1897, chap. 312.

This amendment I think was intended to effect a radical change in the nature of these consents. Theretofore it had been necessary to obtain the consents annually, making the continuance of the business dependent upon the uncertainty of obtaining the necessary consents. The purpose of this amendment seems to have been to overcome this condition, and put a place for which the required consents have been once obtained upon the same basis as regards these consents as a place where the traffic was lawfully carried on at the time ~~the act took effect~~, unless such consents are given for a limited term.

The Legislature recognized, in the original Liquor Tax Law, when it was enacted, a right to some extent continuing beyond the term for which the license had been granted under the License Law which was superseded by the present Tax Law. The restrictions regarding the traffic in liquor in proximity to churches, schools and dwelling-houses do not apply to places where the traffic was carried on lawfully when the Liquor Tax Law took effect; nor is it necessary to obtain the consent of the owners of premises where such traffic was lawfully carried on at that time, and so, in harmony with this policy, the Legislature has provided that whenever these consents have been once obtained and filed, unless given for a limited term, no other or further consents are required. It is true that circumstances might arise and conditions change, making it desirable to require new consents, but the same reason applies with equal force to places lawfully existing when the act took effect, and to which this requirement concededly does not apply.

I am of the opinion that the consent of the original owners, permitting the traffic in liquor by their tenant, upon the premises in question, not being given for a limited term, once made and filed as required by the Liquor Tax Law, remains effective so long as such premises are continuously occupied by him for such traffic, notwithstanding a change in the ownership thereof.

The views which I have expressed lead to the conclusion that the application to cancel and revoke the liquor tax certificate should be denied.

Application to revoke the liquor tax certificate is denied, with fifty dollars costs and disbursements.

Application denied, with fifty dollars costs and disbursements.

Supreme Court, Saratoga Special Term, April, 1901. Reported. 34 Misc. 598.

Matter of the Application of JAMES F. SULLIVAN for a Special Town Meeting in the Town of Moreau, Saratoga County, for a Resubmission to the Electors of Said Town of the Local Option Questions Provided by Section 16 of the Liquor Tax Law.

Liquor Tax Law—Resubmission of local option questions—Laws of 1900, chap. 367, § 3.

The provisions of the Liquor Tax Law (Laws of 1896, chap. 112, § 16, as amended, Laws of 1900, chap. 367, § 3), requiring a town clerk, at least ten days before a town meeting, to post in at least four public places of the town a notice of the fact that all of the local option questions provided for by the statute will be voted on at the town meeting, and also requiring him to publish the notice in a newspaper of the county or of the town, if there be one, five days before the vote is taken, are mandatory, and no other form of notice is sufficient. If such notices have not been given, a resubmission of the statutory local option questions at a special town meeting duly called upon proper petition is proper.

APPLICATION under section 16 of the Liquor Tax Law for a special meeting in the town of Moreau, Saratoga county, for a resubmission to the electors of said town of the local option questions provided by said section.

D. S. Potter, for petitioner.

McArthur & Starbuck, opposed.

HOUGHTON, J. More than twenty days before the biennial town meeting held in the town of Moreau, Saratoga county, on the 5th day of March, 1901, a petition was duly filed with the town clerk of that town, signed by more than ten per centum of the electors voting at the preceding general election, requesting the submission to the electors of the town of the four questions provided by section 16 of the Liquor Tax Law respecting the issuing of license.

Nothing further was done by the town clerk with respect to the submission of these questions except to prepare ballots for the use of electors.

The vote was a large one and resulted in the affirmative with respect to allowing the issuing of license to pharmacists and in the negative as to all the other propositions.

The petitioner Sullivan and other electors of the town insisted that the four propositions with respect to license had not been properly submitted at such town meeting, and procured to be filed with the town clerk a petition signed by ten per centum of the electors voting at the preceding general election, asking that such propositions be resubmitted. This court made an order allowing such resubmission at a special town meeting, as provided by section 16, upon the ground that the town clerk had failed to post notices of the fact that the local option questions were to be voted upon at such town meeting, and had also failed to publish such notice, as required by the amendment to said section passed by the Legislature in 1900. (Chap. 367, § 3.)

This is an application to set aside said order and restrain the resubmission of said questions.

The attention of the town clerk and of those interested in prohibiting the sale of liquors in the town had not been called to the recent amendment of the Legislature with respect to the giving of notice. The provision of law with respect to notice in force at the time of the filing of the first petition and the holding of the town meeting, was as follows: "The town clerk shall also, at least ten days before the holding of such town meeting or general election, cause to be printed and posted in at least four public places in such town, a notice of the fact that all of the local option questions provided for herein will be voted on at such town meeting or general election; and the said notice shall also be published, at least five days before the vote is to be taken, once, in one newspaper published in the county in which such town is situate, which shall be a newspaper published in the town, if there be one."

The parties opposed to a resubmission of the question concede that notices were not given as above prescribed; but they say as good or better notice was given to the electors by the holding of several temperance meetings in various parts of the town, which were largely attended and at which voters were urged to vote against the granting of license, and by the fact that news items, commenting upon the fact that a temperance agitation was going on in the town of Moreau and a vote was to be taken upon the question of license at the coming town meeting, frequently appeared in newspapers published in the village of Glens Falls, in an adjoining county, which were largely taken and read by the voters of the town, and also by the fact that the poll-list of the

preceding election was consulted and printed matter sent to every elector of the town which apprised him of the fact that the question of license or no license was to be voted upon at the town meeting, and urging him to vote for no license, and giving him reasons why he should do so.

These notices were ones which had evidently been used in another locality. They were headed "To the Voters of Petersburg: The following questions will be submitted to you for decision at the coming election, to be held March 2d." Then follows the form of the questions under the old Liquor Tax Law, stating whether traffic in liquors shall be allowed "in the town of Petersburg," with instructions as to how to vote to defeat the proposition, and a computation of how little in taxes will be saved in the town of Petersburg by the license fees collected, and how much more burden would be cast upon the town by allowing the traffic in liquors to exist, with exhortation to vote for no license.

In addition to thus sending this paper to each voter of the town, one of these papers was posted in the mill of the International Paper Company, where many voters worked; another in a grocery store where many of them traded; and another in a shoe store that many of them patronized.

It is very likely that from the temperance agitation and meetings in the town, and from the news items appearing in the Glens Falls papers, which were largely read in that town, a very large number, and possibly all, of the voters knew that the question of license or no license was to be passed upon at the town meeting; and they probably understood that the paper which was mailed to them and posted in the three places in the town related to the vote which was to take place at the town meeting. But even if every elector received the paper mailed to him and saw those that were posted in the three places, it can hardly be said, in any legal sense, that it was a notice that the voters of the town of Moreau were to pass upon the local option questions. It was not directed to them, but to the voters of another town. The date mentioned for the town meeting was the second of March, whereas this town meeting was the fifth of March, and it was not signed by any official of the town.

The provisions of the Liquor Tax Law as to what shall be done by the town clerk with respect to notice, when the questions are

to be voted upon, are clear, and it seems to me mandatory. He "shall," at least ten days before the holding of the town meeting, post in "four" public places, a notice of the fact that the local option questions will be voted on; and he "shall" publish said notice, at least five days before the vote is to be taken, in a newspaper in the county, or in the town, if there be one. The law does not say that he "may" give notice in any other manner, either by mailing actual official notice or by personal notice. It is a familiar proposition of statutory construction that where persons are interested in the giving of notice, as all the electors of a town are in the question as to whether there shall be license or no license, the use of the word *shall*, in directing the manner of notice, is mandatory. (*Matter of Douglass*, 46 N. Y. 42, 44.)

The Legislature had in mind that some such thing as has happened here might happen, in view of the fact that town clerks are elected from the business men of the various towns of the State and not versed in the law, when it provided that "if for any reason, except the failure to file any petition therefor, the four propositions to be submitted herein to the electors of the town shall not have been properly submitted at such town meeting, such propositions shall be resubmitted at a special town meeting duly called." An opportunity is thus given, if there be any error in the first submission, for the electors to again in legal manner record their will.

The failure to give notice by posting and publishing is not, therefore, a mere irregularity, but rendered the vote a nullity.

In *Matter of Eggleston*, 51 App. Div. 38, one phase of the local option law was very carefully passed upon by the Appellate Division of the fourth department. In that case the town of Dayton, in the county of Cattaraugus, held its town meeting on the day of general election. A petition for the submission of the question of license or no license was filed first with the town clerk and then taken from that office and filed with the county clerk of the county. No notices were given by the town clerk for the submission of the question. The court held that the vote was a nullity, saying, "The filing of the petition with the town clerk was a necessity, and the ten days' notice by that official obligatory."

In *People ex rel. Caffrey v. Mosso*, 30 Misc. Rep. 164, one of the questions submitted did not follow the language of the

statute. It was held that this was mandatory and the vote upon the question of no effect.

In *McMullen v. Berean*, 29 Misc. Rep. 443, the petition was filed with the town clerk, but not with the county clerk (the town meeting being held at the time of the general election), within the prescribed time. The court held that this requirement was mandatory, remarking, "that when the law clearly points out the way in which proceedings must be taken by those desirous of ascertaining the will of the electors of the town, the plain provisions of the law must be complied with. It is not for the courts to commend or condemn the statute but to enforce its provisions."

In *People ex rel. Hovey v. Town Clerk*, 26 Misc. Rep. 220, the petition was not filed with the town clerk twenty days before the town meeting, and the court held that he could not be required to print the ballots.

The cases cited by counsel seeking to uphold the former vote are not contrary to those referred to.

In *People ex rel. Crane v. Chandler*, 41 App. Div. 178, there are some remarks of the court which would seem to hold that a less notice than that required by the statute would be effectual. An examination of that case, however, shows that the real question decided was whether or not the town clerk could be compelled to forthwith call a special town meeting for resubmission of the questions. The court held that that he could not do until the court had granted an order permitting such town meeting as provided by the section. This case was decided by the same court, composed of several of the same judges, which decided *Matter of Eggleston*, 51 App. Div. 38, and if there is any holding in the former case contrary to the last it must be deemed to have been overruled by the latter decision, which holds that it is incumbent upon the town clerk to give notice in the manner prescribed by the statute.

In *Matter of Arnold*, 32 Misc. Rep. 439, the case involved only the question of the form of the ballot, and the court there held that whatever existed was a mere irregularity.

In *People ex rel. Hirsh v. Wood*, 148 N. Y. 142, several officials of the same class were to be voted upon and the relator complained that his name was opposite the wrong one upon the other ticket. The court held that this could not vitiate the vote.

It is to be regretted that the vote as recorded by the electors of the town cannot stand and that there is necessity for resub-

mission. It is doubtless true that the vote recorded the will of a majority of the electors of the town. The plain provisions of the law, however, were not complied with and, therefore, the vote was of no avail.

The motion is denied, but without costs.

Motion denied, without costs.

Supreme Court, Livingston Chambers, April, 1901. Reported. 34 Misc. 636.

Matter of the Application of WILLIAM A. POWERS et al., for a Special Town Meeting of the Electors of the Town of Palmyra.

Liquor Tax Law—Submission of local option questions—Laws of 1900, chap. 367, § 3.

The provisions of the statute (Laws of 1900, chap. 367, § 3), requiring a town clerk at least ten days before a town meeting to print and post notices that the local option questions will be voted upon at the town meeting, are mandatory, and there is no jurisdiction to take the vote on these questions where this requirement of the statute has been disregarded and omitted by the town clerk.

MOTION to vacate the *ex parte* order made herein for a special town meeting.

Geo. S. Tinklepaugh, for petitioner William A. Powers.

Henry R. Durfee, for G. A. Tuttle and others, citizens moving to set aside order.

NASH, J. The question here is whether legal notice was given of the proposed submission of the local option questions, provided by the Liquor Tax Law, to the electors, to be voted on at the town meeting held in the town of Palmyra on the 5th day of March, 1901.

The statute (L. 1900, chap. 367, § 3) provides that the town clerk shall, at least ten days before the holding of the town meeting, cause to be printed and posted in at least four public places in the town, a notice of the fact that all of the local option ques-

tions provided for by the statute will be voted on at the town meeting; and the notice shall also be published, at least five days before the vote is taken, once, in one newspaper published in the county in which such town is situate, which shall be a newspaper published in the town if there be one.

There was an entire omission of the town clerk to print and post the notices required by the statute.

The provision of the statute that, at least ten days before the holding of the town meeting, the town clerk shall cause the notices to be printed and posted, is peremptory, an absolute requirement necessary to give jurisdiction to take the vote prescribed by statute. The questions are to be submitted, "provided the electors of the town to the number of ten per centum of the votes cast at the next preceding general election shall request such submission by written petition," and the town clerk shall give the requisite notice. It will hardly be claimed by any one that the giving of notice of the proposed submission can be dispensed with, that if no notice whatever is given the election will be valid.

It is argued that the publication of the notice in the newspapers was sufficient. It may well be that the means taken to bring the matter before the people, and the notice actually given, was more general and gave more publicity to the fact that the proposed submission was to be made, than would the posting of the four notices. But that is not what the law requires. It provides that the notices shall be posted at least ten days before the meeting. The electors are to have that length of notice, and also in addition, the notice shall be published in one newspaper published in the county, which shall be a newspaper published in the town, if there be one. The former is the principal notice, the latter merely an adjunct or subordinate. In towns not having a newspaper, the notice would be published once in a newspaper in any part of the county. It is not a question of actual but of legal notice. It is analogous to the notice required for a judicial sale where both posting and publication are required. Neither can be omitted.

In fact, it does not appear that the publication in either of the newspapers was intended by the town clerk as a compliance with the statute requiring publication of the notice.

There does not appear to be any authority which can be regarded as an adjudication in point. In *Matter of Eggleston*,

51 App. Div. 38, one of the questions decided, as stated in the opinion of the court, is, that notice of the proposed submission must be given, which in effect is that it is jurisdictional, and so far sustains the contention of the petitioner.

The authorities cited to the effect that there is no principle of law which permits the disfranchisement of innocent voters for the mistakes, or even the wilful misconduct of election officers in performing the duty cast upon them, are not pertinent to the question here. There is not an attempt to disfranchise, it is to enfranchise, to make valid that which is invalid, a proceeding provided by the statute to obtain a valid election. The question being jurisdictional, it may be raised collaterally, and a decision here adverse to the petitioner would involve the town in a litigation, the cost of which would be far in excess of a new election. The public interests seem to require that the local option questions should be resubmitted at an election, about the validity of which no question can arise.

The motion to vacate the order should be denied.

Motion denied.

Supreme Court, Ontario Special Term, April, 1901. Reported. 34 Misc. 662.

Matter of the Application of WILLIAM ROWLEY for an Order Directing That a New Town Meeting Be Held in the Town of Manchester, Ontario County, N. Y., as Provided by Section 16 of the Liquor Tax Law.

Liquor Tax Law—Submission of local option questions—Laws of 1900, chap. 367, § 3.

The provisions of the statute (Laws of 1900, chap. 367, § 3), requiring a town clerk, at least ten days before a town meeting, to print and post, and at least five days before the vote is taken, to publish in one newspaper, notice that the local option questions will be voted upon at the town meeting, are directory merely, and although he wholly fails to comply with the statute, the vote cast at the town meeting is valid where it appears that sample ballots containing each of the four propositions to be voted upon were mailed to the electors, that public meetings were held for discussing the local option questions, that individuals freely distributed in the town circulars in regard to such questions, and that the vote as to them was larger than that cast for any candidate.

APPLICATION for an order directing that a new town meeting be held in town of Manchester, Ontario county, N. Y., as provided by section 16 of the Liquor Tax Law.

John Colmey, for petitioner.

W. C. Ellis, with Frank Rice, for respondents.

RICH, J. On the 31st day of January, 1901, there was filed in the office of the town clerk of the town of Manchester, Ontario county, N. Y., the petition required by section 16 of the Liquor Tax Law (L. 1896, chap. 112), praying that the question of the sale of liquor in that town be submitted to the voters thereof at the town meeting to be held March 5, 1901. It, therefore, became the duty of the town clerk (see L. 1900, chap. 367, § 3), at least ten days before the holding of such town meeting, to cause to be printed and posted in not less than four public places in the town a notice of the fact that all of the local option questions would be voted on at such town meeting, and also to publish said notice at least five days before the vote was to be taken, once in one newspaper, and although he was informed of his duty in respect to giving such notice prior to the 5th day of March, 1901, there was an entire failure upon his part to perform his duty in that regard.

Notice was given, however, to the electors, of the fact that all of the local option questions would be voted on at such town meeting, sample ballots containing each of the four propositions to be voted upon were mailed to every elector of the town who voted at the general election in the fall of 1900, and to those also who had become residents thereof prior to March 5, 1901. And in addition to this, several public meetings were held, at which the local option questions were discussed. Notices of these discussions appeared in a newspaper published in the town of Manchester, February 16, February 23 and March 2, 1901. Not content with this, and in order that notice that these questions were to be voted upon should be given to all, it was conceded upon the argument that circulars were freely distributed throughout the town, one being signed by Rev. Father O'Hanlon, and eleven others addressed "To the voters of the town of Manchester," giving them instructions, and concluding as follows: "vote (No)

in the name of our children, our wives, our homes, our churches, and for the sake of good order vote (No)."

Another as follows:

"A WORD TO VOTERS."

"At the approaching Town Meeting the question of license is to be voted upon, and in order that every voter may exercise the right of his franchise intelligently, it may not be out of place to call his attention to a few candid facts. The Town of Manchester, under no license law, loses at least \$1,000 a year which might be collected from license certificates.

"It also loses thousands of dollars more during the course of a year by trade which is driven away by the operation of no license. So long as liquor is sold in Canandaigua, Phelps, Orleans, Palmyra and Geneva, the residents of the town of Manchester will be supplied with liquor, ale and beer in large or small quantities. The good people who favor and vote for no license imagine that they have a law, when in reality they have no law whatever. If license is voted, the several hotels in the town will be under the operation of the Raines Liquor Tax Law, and any person caught violating the law is liable to have his license revoked, and be subjected to a severe fine. Now, then, voters, which will you have — liquor sold according to law, or the present 'Moonshine' system continued? Will you vote to keep trade and money at home to reduce taxes, or will you vote for a law which will continue to aid Canandaigua, Phelps, Orleans, Palmyra and Geneva? It is for you to decide."

"A TAXPAYER."

That the electors received notice of the proposal to vote upon this question is evidenced by the fact that, while the whole number of votes cast for supervisor at said town meeting was 1,146, with 68 blank ballots, which was the combined highest vote for any officer, the total number of votes cast upon each of the four liquor tax propositions was 1,218.

As I have said before, it was the duty of the town clerk to "give notice of the vote on local option." *Matter of Eggleston*, 51 App. Div. 38. The statute in respect to his duties is directory only. In case of a failure of the town clerk to post and publish the notice where the electors were not given other notice, the vote cast would be void, and the will of the people thwarted by the wilful refusal of that officer to perform his duties. But that is

not the case here. The end sought to be attained by the statute, to wit, the "giving of notice of the questions to be voted for at the town meeting," was accomplished in this case, as already clearly appears.

The learned counsel for the petitioner contends that the *Matter of Eggleston*, above cited, is decisive upon the question involved on this motion. In that case, at the time notice should have been given no preliminary petition was on file in the town clerk's office, the very basis and foundation of the right to a submission of the question was absent; the question of the requirement that the clerk post notices was only incidentally discussed. That it was not intended to decide that the giving of the notice by the clerk was an absolute necessity is found in that the same court decided the case of *People ex rel. Crane v. Chandler*, 41 App. Div. 178, which is an authority upon this question. Ballots and samples thereof were delivered by the town clerk prior to the holding of the town meeting, to the chairmen of the several election boards, as required by law.

The questions were fairly submitted to the electors of the town, and why, under the circumstances of this case, should the question be resubmitted, and the town put to the expense and inconvenience of another election? There is no good reason for it. This motion must, therefore, be denied, with ten dollars costs to respondents.

Motion denied, with ten dollars costs to respondents.

Court of Appeals. Reported. 166 N. Y. 410.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, *v.* EDWARD PERLMUTTER, Defendant, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant.

Liquor Tax Law—Recovery of entire penalty of bond.

Under the provisions of section 18 of the Liquor Tax Law (Laws of 1896, chap. 112, amd. Laws of 1897, chap. 312), the State Commissioner of Excise may maintain an action upon the bond required as a condition to the issuance of a liquor tax certificate, either for the recovery of the entire penalty for any breach of any condition of the bond or for the amount of any penalty or penalties incurred or imposed for a violation of the law.

Lyman v. Perlmutter, 49 App. Div. 630, affirmed.

(Argued March 8, 1901; decided April 16, 1901.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 21, 1900, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The action was upon a liquor tax bond given by the defendants to the treasurer of the county of Dutchess May 1, 1897, upon the application by the defendant Edward Perlmutter for a liquor tax certificate, which was then issued to him.

The bond is as follows:

"Know all Men by these Presents, that we, Edward Perlmutter, of Clinton Corners, in the Town of Clinton, County of Dutchess, State of New York, as principal, and the Fidelity and Deposit Company of Maryland, having a principal office for the State of New York at No. 35 Wall Street, in the city of New York, a corporation duly authorized to issue surety bonds by the Laws of the State of New York, as surety, are held and firmly bound unto the People of the State of New York in the Penal Sum of Five Hundred Dollars, for the payment of which sum well and truly to be made the said principal and surety bind ourselves, our heirs, executors, administrators, successors and assigns, respectively, jointly and severally, firmly by these presents.

"Dated the first day of March, 1897.

"Whereas, The above bounden principal is about to apply for a Liquor Tax Certificate in the sum of One Hundred Dollars for Excise Tax on the business of trafficking in liquors near Upton Lake in the Town of Stanford, County of Dutchess, State of New York, under subdivision 1 of section 11 of the Liquor Tax Law of the State of New York.

"Now, the Condition of this Obligation is such, That if the said Tax Certificate applied for, as aforesaid, is given unto the said principal, and the said principal will not, while the business for which such Tax Certificate is given shall be carried on, suffer or permit any gambling to be done in the place designated by the Tax Certificate in which the traffic in liquors is to be carried on, or in any yard, booth or garden appertaining thereto or connected therewith, or suffer or permit said premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law, or any act amendatory thereof or supplementary thereto, then this obligation shall be void, otherwise it is to be and remain in full force and effect to cover every violation of the Liquor Tax Law and all fines and penalties incurred or imposed thereunder.

An action for the breach of any condition of this bond may be maintained without previous conviction or prosecution for violation of any provision of said Liquor Tax Law."

The referee found that Perlmutter violated a provision of the Liquor Tax Law on the second Sunday of August, 1897, by selling in the place specified in the bond and certificate, liquor to be drunk upon the premises to three persons who did drink the same thereon, and this he characterized in his decision as at least one offense, and found as a matter of law that one offense entitled the plaintiff to a recovery of \$500, the penalty of the bond.

James Russell Solcy and Frank H. Platt for appellant. The excise bond is a bond given to secure collaterally the payment of fines and penalties and for no other purpose. The amount named in the bond is to be considered as a penal sum and not as liquidated damages. (*Taylor v. Sandiford*, 7 Wheat. 13; *Davies v. Penton*, 6 B. & C. 216; *Bignall v. Gould*, 119 U. S. 498; 1 Sedg. on Dam. [8th ed.] 558.) Upon the question whether the sum named in a contract is a penalty or liquidated damages, the courts lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained. (*Spencer v. Tilden*, 5 Cow. 151; *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137; 1 Sedg. on Dam. 589; *Van Buren v. Diggs*, 11 How. 461; *Bignall v. Gould*, 119 U. S. 495; *Dyer v. Dorsey*, 1 G. & J. 440; *Stearns v. Barrett*, 1 Pick. 443; *Salters v. Ralph*, 15 Abb. Pr. 273; *Colwell v. Lawrence*, 36 How. Pr. 306; *Williams v. Vance*, 9 S. C. 344; *Smith v. Wainwright*, 24 Vt. 97.) The sum named in the bond, even though stated to be liquidated damages, will not in any case be so considered if the sum is unreasonable, or unjust and oppressive, or extravagant, or disproportionate to the actual damages. (*Ward v. H. R. B. Co.*, 125 N. Y. 230; *Curtis v. Van Bergh*, 161 N. Y. 47; *Colwell v. Lawrence*, 38 N. Y. 74; 1 Sedg. on Dam. [8th ed.] 583.) Where the stipulated sum is collateral to the object of the contract, being apparently inserted as security for performance, it cannot be allowed as liquidated damages. (*Holt's N. P. Rep.* 43; 1 Sedg. on Dam. [8th ed.] 588; *Astley v. Weldon*, 2 B. & P. 346; *Kemble v. Farren*, 6 Bing. 141.) The bond does not impose an independent forfeiture. (*U. S. v. Cutajar*, 59 Fed. Rep. 1000.) The provisions of the statute, taken

as a whole, negative the theory that the bond imposes an independent forfeiture, and establish the conclusion that it is merely collateral. (L. 1897, ch. 312, §§ 34, 42.)

P. W. Cullinan for respondent. The penal provision of the liquor tax bond is punitive in character, and the bond being statutory in nature, the measure of damages for a breach thereof is the full penal sum. (*U. S. v. Chouteau*, 102 U. S. 603; *U. S. v. Reisinger*, 128 U. S. 398; *Huntington v. Attrill*, 146 U. S. 657; *Peachy v. Somerset*, 1 Strange, 453; *Keating v. Sparrow*, 1 B. & B. 367; Pom. Eq. Juris. § 458; *Matter of Bran*, L. R. [18 Eq.] 410; *Todd v. Robinson*, L. R. [12 Q. B. D.] 530; *Bensen v. Gibson*, 3 Atk. 395; *Treasurer v. Patten*, 1 Root, [Conn.], 260.) The full penal sum is the measure of damages in an action on a statutory bond for a breach thereof. (*Powell v. Redfield*, 4 Blatchf. 445; *U. S. v. Montell*, 4 Fed. Cas. 15; *U. S. v. Hatch*, 1 Paine, 336; *U. S. v. Valensona*, 67 Fed. Rep. 146; *Clark v. Barnard*, 108 U. S. 436.) The measure of damages in a liquor tax bond for a breach thereof is the full penalty of the bond and the bond is not to be treated as though collateral to the payment of the fines and penalties of the principal. (*Lyman v. Brucker*, 26 Misc. Rep. 594; 42 App. Div. 624; *Lyman v. R. T. Ins. Co.*, 37 App. Div. 236; *Lyman v. Gramercy Club*, 39 App. Div. 661; *Republic of Mexico v. Ockershausen*, 37 Hun, 533; *Willett v. La Salle*, 19 Abb. Pr. 292; *Harris v. Hardy*, 3 Hill, 393; *People ex rel. v. Eckman*, 63 Hun, 209; *State v. Hall*, 13 So. Rep. 39; *People v. Harrison*, 28 How. Pr. 247; *Lyman v. Shenandoah S. Club*, 39 App. Div. 459.)

LONDON, J. In cases between the government and a private party, in which the purpose of the bond is to secure an observance of the law in pursuance of which the bond is given, and punishment or satisfaction for its non-observance, then the penalty named in the bond is the measure of damages for its breach, unless the statute under which the bond is given or the bond itself, read in the light of the statute, indicates a less or different measure. In such cases in which the statute fixes the measure of damages the courts cannot relieve against it, unless authorized by statute to do so. The remission of the forfeiture of bail in criminal cases may be cited as one instance of the power to afford relief. (Code Criminal Procedure, sec. 597.) There may be

other instances, but few and the exceptions seem to prove the rule. Where the breach of the condition is an offense against public law or policy, pecuniary damages, if they follow, are usually a minor incident; the affront is to the State and its sovereign will; but some sort of satisfaction should be exacted, and when the statute has fixed its measure in money, the courts must award it. (Story Eq. sec. 1326; 4 Am. & Eng. Ency. of Law [2d ed.], 700; *Clark v. Barnard*, 108 U. S. 436; and cases cited.)

The contention of the appellant is that the statute under which this bond is given fixes a penalty of \$50 for the particular violation of the Liquor Tax Law, found by the trial court to be the offense of the principal in the bond, and, therefore, that that sum, and not \$500, the penalty in the bond, is the measure of damages.

That the plaintiff might have sued upon the bond as collateral security for the statutory penalty for the single offense need not be questioned; the question is, does the statute give him the right to recover the entire penalty because of the single offense?

When the bond was delivered section 18 of the Liquor Tax Law as amended by chapter 312 of the Laws of 1897 was in force. The bond in form substantially covers all its requirements, and must be construed as if it literally embraced them. Its condition read in the language of the section is, that the principal will not permit gambling upon the premises, or allow them to become disorderly, "and will not violate any of the provisions of the liquor tax law; and that all fines and penalties which shall accrue * * * and any judgment or judgments recovered therefor, will be paid. * * * The state commissioner of excise may at any time without previous prosecution or conviction for violation of any provision of the liquor tax law, or for the breach of any condition of said bond, commence and maintain an action, in his name, as such commissioner, in any court of record in any county of the State, for the recovery of the penalty for the breach of any condition of any bond, or for any penalty or penalties incurred or imposed for a violation of the Liquor Tax Law."

Thus the state commissioner may maintain his action either "for the recovery of the penalty for the breach of any condition of any bond, or for any penalty or penalties incurred or imposed for a violation of the liquor tax law." This action is under the first of these alternatives, namely, "for the recovery of the penalty for the breach of any condition of any bond," meaning, of course, the penalty of the breach of any condition of any bond.

The action is not to recover any fine imposed upon conviction, or penalty previously recovered in a civil action, and the bond is not limited to its collateral quality in either respect. It seems to be the intent of the section, as amended in 1897, to give to the bond a broader scope, namely, to subject the offender to the larger penalty in case the state commissioner of excise, the special administrator of the law, should think fit to bring the action for that purpose. It is common knowledge that the temptation to violate this and previous excise laws has developed a fertility and variety of abuses, evasions and violations that in default of rigorous treatment weaken the efficiency of the law, both as a revenue measure and as a regulator of the liquor traffic. Recourse to the penalty named in the bond, instead of the fine or penalty named in any section of the act for a specific violation, was no doubt thought to be necessary in order to secure observance of the provisions of the act. If the surety thereby suffers and the offender sometimes escapes, the public may benefit by inducing the surety to become more watchful of the character of the vendor for whose fidelity he engages, and thus violations will be lessened by making it more difficult for lawless men to obtain their bonds, and when they obtain them to make them more circumspect in regard to the obligations they have assumed. Such, we think, is one of the purposes of the section providing for this bond, and the recovery is within its letter and spirit.

The judgment should be affirmed, with costs.

O'BRIEN, BARTLETT, HAIGHT, MARTIN and VANN, JJ., concur;
PARKER, Ch. J., not sitting.

Judgment affirmed.

Fourth Appellate Department, April, 1901. Reported. 61 App. Div. 612.

In the Matter of the Application of W. L. SAUNDERS, Appellant,
for an Order Revoking and Cancelling Liquor Tax Certificate
No. 26,267, Granted to HENRY GARNSEY, Respondent.

Order affirmed, with costs.

All concurred.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
May 11, 1901.

In the Matter of the Petition of NORMAN PLASS to Revoke the
Liquor Tax Certificate of WILLIAM DALY.

Scott & Mayham, for petitioner.

Page & Eckley, for respondent.

O'GORMAN, J. The testimony offered by the petitioner is contradictory and is sharply controverted by the witnesses called by the respondent, many of whom appear to be absolutely disinterested. There are various suspicious circumstances connected with this prosecution which do not incline me favorably to the petitioner's case, and, after a careful consideration of all the evidence, I conclude that the application should be denied, with costs.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
May 31, 1901.

PEOPLE ex rel. A. H. B. MEYER v. JAMES J. HAGAN.

APPLICATION for a writ of habeas corpus on behalf of a defendant held to bail by Court of Special Sessions upon the charge of selling liquors without a liquor tax certificate at The Maryland Kitchen, No. 254 West 34th Street, New York city. No liquor tax certificate could be obtained for this place on account of its proximity to a church and a dwelling, so that the liquors served there were obtained from another saloon across the street.

Morris Meyer, for defendant.

Assistant District Attorney Schurman, for the People.

O'GORMAN, J. The contention of the district attorney that the decision of the magistrate is a final order of a competent

tribunal and cannot be reviewed cannot be upheld. The order of the magistrate is not a final order within subdivision 2 of section 2032 (*People v. Wells*, 68 Sup. 60; *People v. Fox*, 34 Misc. 82, Law Journal, February 11, 1901), and this court is not precluded from going behind the return, nor is the commitment conclusive as to the legality of the imprisonment. Jurisdiction could not be acquired by the magistrate until it appeared by competent evidence that an offense had been committed, and that there was sufficient cause to believe the defendant guilty thereof. It conclusively appears from the evidence offered by the People that the defendant neither sold nor gave away the liquor in question. He was certainly not required to object to his guest purchasing liquor elsewhere and drinking the same upon the defendant's premises, and by permitting his guest to do so the defendant cannot be said to have incurred a criminal liability. As the case is wholly without testimony showing a violation of the Liquor Tax Law by the defendant or any other person, the writ must be sustained and the defendant discharged.

Third Appellate Department, May Term, 1901. Reported. 61 App. Div. 312.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ORNELDO SATCHWELL, Appellant.

Conviction under an indictment for the sale of intoxicating liquors—When it is a bar to a subsequent conviction under another indictment—Effect of a plea of guilty to an indictment.

A conviction on a plea of guilty to an indictment is a bar to a subsequent prosecution for any offense which was provable against the accused under that indictment.

A conviction on a plea of guilty to a charge that the defendant, on or about the 30th day of December, 1898, at the town of Candor, sold by retail "to Gardiner C. Hibbard, and to other and divers persons to this grand jury unknown, and did deliver in pursuance of such sale to the said Gardiner C. Hibbard (and to the said other and divers persons) strong and spirituous liquors" in quantities of less than five gallons at a time, without having any liquor tax certificate granted to him, is a bar to a subsequent conviction under an indictment charging that on or about the 30th day of December, 1898, at the town of Candor, the accused sold by retail "to Frederick J. Bryant, and did deliver, in pursuance of such sale, to the said Frederick J. Bryant, and divers other persons to this jury

unknown, strong and spirituous liquors" in quantities of less than five gallons at a time, without having any liquor tax certificate granted to him, as the sale to Bryant charged in the second indictment could have been proved under the first indictment.

APPEAL by the defendant, Ornelo Satchwell, from a judgment of the County Court of Tioga county in favor of the plaintiff, rendered on the 11th day of June, 1900, upon the verdict of a jury convicting him of a violation of the Excise Law, also from an order entered in said clerk's office on the 12th day of June, 1900, overruling a plea of a former conviction, and also from an order entered in said clerk's office denying the defendant's motion for a new trial made upon the minutes.

At a Trial Term of the Supreme Court held in Tioga county in March, 1899, the grand jury found an indictment against the defendant, charging that on or about the 30th day of December, 1898, at the town of Candor, in that county, the defendant sold by retail "to Gardiner C. Hibbard, and to other and divers persons to this Grand Jury unknown, and did deliver in pursuance of such sale to the said Gardiner C. Hibbard (and to the said other and divers persons) strong and spirituous liquors" in quantities of less than five gallons at a time, without having any liquor tax certificate granted to him.

The defendant was arraigned under this indictment, pleaded guilty and was sentenced by the court to pay a fine of \$200.

At a June term of the County Court of the county of Tioga the grand jury found an indictment against the defendant, charging that on or about the 30th day of December, 1898, at the town of Candor, in that county, the defendant sold by retail "to Frederick J. Bryant, and did deliver, in pursuance of such sale, to the said Frederick J. Bryant, and divers other persons to this jury unknown, strong and spirituous liquors" in quantities of less than five gallons at a time, without having any liquor tax certificate granted to him.

On arraignment under this indictment the defendant entered a plea of a former conviction.

The trial of this issue was had before a jury of that county and a verdict was rendered for the People. On the trial it appeared by the testimony of the witnesses Bryant and Gardiner, the special agents of the Excise Department, who made the complaint against the defendant, that they had been at defend-

ant's hotel and bought liquor on but one occasion, and that was on December 30, 1898. Hibbard and Bryant each bought from the defendant and paid for intoxicating liquors which were drunk by themselves and others, and Bryant bought liquor which was not drunk. Their testimony before the grand jury that found the first indictment was substantially the same as their testimony before the grand jury that found the second indictment.

From the judgment entered on the verdict of the jury and from the order of the court denying defendant's motion for a new trial, this appeal was taken.

John P. Wheeler, for the appellant.

Oscar B. Glezen, for the respondent.

EDWARDS, J. On the undisputed facts in this case the defendant, on his plea of a former conviction, was entitled to judgment. The burden was on him to show a conviction of an offense identical with the one with which he was charged in the second indictment. This he established, *prima facie*, by the production of the record showing a conviction under an indictment which could be sustained by the evidence necessary to support the second indictment; and it was then incumbent on the prosecution to show that the conviction was, in fact, for a different offense. (3 Greenl. Ev. § 37; 17 Am. & Eng. Ency. of Law [2d ed.], 597; *People v. McGowan*, 17 Wend. 386; *Commonwealth v. Robinson*, 126 Mass. 259.)

I think there can be no question that under the first indictment charging the defendant with selling strong and spirituous liquors at the town of Candor on December 30, 1898, "to Gardiner C. Hibbard, and to other and divers persons to this Grand Jury unknown," the prosecution could have proved the sale by the defendant, on that day, in that town, of strong and spirituous liquors to Frederick J. Bryant as charged in the second indictment. The offense consisted in the sale of liquor without a liquor tax certificate, and under the designation "to other and divers persons," proof may be given of sale to any individual. (*People v. Adams*, 17 Wend. 475; *People v. White*, 55 Barb. 606.)

It is true that each sale of liquor without a license is a distinct offense, and the prosecution proved sales made by the defendant on December thirtieth to both Hibbard and to Bryant, but the

only effect of this was to show that there could have been a conviction under the first indictment for a sale to Hibbard. So there could have been for a sale to Bryant. Had the conviction been the result of a trial, the record might have shown that it was, in fact, for an offense other than the one now charged; but the defendant having pleaded guilty to the first indictment, his conviction on that plea was, in legal effect, of any offense which was provable against him under that indictment. Such a plea "is a record admission of whatever is well alleged in the indictment." (1 Bish. New Cr. Proc. [4th ed.] § 795.)

If an anomalous result is thus produced, it is attributable to the form of the pleading in the first indictment. Had it charged the sale of intoxicating liquors on that day to Hibbard only, the plea of guilty would have been of an offense which would have been readily distinguishable from the one charged in the second indictment.

The judgment and order denying a new trial should be reversed.

All concurred.

Judgment and order reversed and defendant discharged.

Second Appellate Department, May, 1901. Reported. 61 App. Div. 500.

PEOPLE v. EDWARD CLARK.

APPEAL by the defendant, Edward Clark, from a judgment of the Court of Special Sessions of the city of New York, second division, borough of Brooklyn, rendered on the 25th day of January, 1901, convicting him of selling liquor in violation of the Liquor Law.

Victor E. Whitlock, for the appellant.

William Van Wyck, assistant district attorney, for the respondent.

JENKS, J.: The defendant appeals from a judgment of the Court of Special Sessions of the second division of the city of New York, that convicts him of a violation of the Liquor Tax Law under the charge of selling liquor on Sunday. The defense did not offer any evidence. Section 31 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), makes it unlawful for "any corporation, association, copartnership or person, * * * to sell, offer or expose for sale, or give away liquors * * * a. On Sunday or before five o'clock in the morning on Monday." If the People proved beyond a reasonable doubt that the defendant offered and exposed liquor for sale on Sunday, it was sufficient proof of a violation of the section quoted. They were not compelled to go further to prove that the defendant was not within the protection of the exception to the provisions of clause "a", which is contained in a subsequent part of the section, but it was for the defendant to offer evidence that he was within such exception. (*Matter of Lyman*, 28 App. Div. 127; *People v. Crotty*, 22 id. 77, and authorities cited; Bish. Stat. Cr. (3rd ed.) section 1051.) The testimony of the witnesses for the People is that on Sunday November 18, 1900, they went into a saloon, stood before a bar and ordered a drink, or whisky, from the defendant, who was behind the bar, whereupon the defendant put down a bottle and glasses upon the bar; that they then poured liquor out of that bottle into those glasses, and that they then drank the liquor, which was whisky. This testimony, if believed, made out a case for the people. It is contended that the information laid charged that the defendant did "offer and expose for sale," and that the evidence is insufficient to establish that charge. The witnesses for the People were policemen, who at the time wore citizens' dress. They first went through a hall door, thence into a rear room, and there gained access to the barroom. They found the defendant behind the bar, clad in part in a cardigan jacket and a white apron. They did not know him, nor did he know them. They ordered and drank, but did not pay. This was plainly an offer and exposure for sale. None would be so credulous as to credit that, under the circumstances, the defendant intended to make a donation to strangers simply upon their call for drink.

The judgment must be affirmed.

All concurred.

Judgment of the Court of Special Sessions affirmed.

Fourth Appellate Department, May, 1901. Reported. 61 App. Div. 559.

PEOPLE v. ARNOLD BATES.

APPEAL by the defendant, Arnold Bates, from a judgment of the County Court of Ontario county, rendered in favor of the plaintiff on the 11th day of March, 1901, convicting him of the crime of violating the Liquor Tax Law.

George Raines, for the appellant.

Robert F. Thompson, for the respondent.

RUMSEY, J.: The defendant demurred to the indictment on the ground, among others, that the facts stated did not constitute a crime. That demurrer was overruled, the case was tried and the defendant was convicted and sentenced, and he takes this appeal from the judgment of conviction.

The appeal brings up the ruling upon the demurrer (Code Crim. Proc. § 517) and the defendant relies upon an alleged error in that ruling for the reversal of this judgment. The indictment accused the defendant of the crime of a violation of the Liquor Tax Law committed as follows: "That the said Arnold Bates * * * on or about the 16th day of October, in the year of our Lord one thousand and nine hundred, at the said town of Richmond, in the county aforesaid, with force and arms, certain liquors (naming them), wrongfully and unlawfully did sell to one Spencer Becker and to certain other persons whose names are to the grand jury aforesaid unknown." Then follows the usual formal ending of an indictment.

It was held by the learned county judge that this indictment sufficiently stated the crime of which the defendant was accused, and for that reason the demurrer was overruled. The law requires that the indictment must contain, among other things, a plain and concise statement of the act constituting the crime, without unnecessary repetition. (Code Crim. Proc. § 275.) The defendant insists that there is no inference of the commission of a crime arising from an allegation of a sale of liquor in the town of Richmond. It is true that the indictment says that the liquor was illegally sold, but that does not amount to a statement of a

fact, but is merely a conclusion of law, and does not aid the defendant in giving him information of the nature of the crime of which he is accused. Nor is the indictment strengthened by the fact that the defendant is accused of the crime of violation of the Liquor Tax Law.

The statute requires not only that the crime of which the defendant is charged should be stated, but that there should be in addition a plain and concise statement of the act constituting the crime. It is here that the defect lies. In considering the sufficiency of the indictment it must be remembered that no question is presented as to the proof necessary to convict under it. The only question is whether there can be found within the indictment such a statement of the act constituting the crime as will enable the defendant to know precisely what it is alleged he has done by way of violation of the Liquor Tax Law, so that he may meet the proof which is likely to be offered against him.

It is necessary that the statement should be contained in the indictment itself. (*People v. Olmsted*, 74 Hun, 323.) An illegal sale of liquor in the town of Richmond might be made either by selling without a certificate; or if one had a certificate by selling in a prohibited manner, or to prohibited persons, or at prohibited days or hours; or if the electors of the town had, under section 16 of the statute, voted to limit the persons to whom, or the purposes for which, a certificate might be given, by selling in violation of their determination as declared by that vote. The defendant is undoubtedly entitled to know in what particular way it is said that he sold illegally in that town.

The claim is, that by the vote of the electors of the town it had been determined that no certificate to sell liquor in that town should be granted, and that, therefore, any sale was a violation of the statute. Nothing of that kind, however, is alleged in the indictment. It is sought to be sustained because it is said that the Liquor Tax Law being a public act, and the vote of the electors of the town of Richmond that no certificates to sell liquor should be permitted to be issued within that town, being also a public act, the court is bound to take judicial notice of them; and that, therefore, it is not necessary to allege or prove those facts.

There is grave doubt whether this proposition could be sustained, but if it could it simply goes to the nature of the proof to establish the crime, and does not tend in any way to relieve the People of the necessity of alleging in the indictment the

manner in which the crime was committed. Under the former excise law when one was accused of selling liquors without a license, it was necessary to allege that fact in the indictment. (*Jefferson v. People*, 101 N. Y. 19, 22.) The same rule applies under this law. (*People v. Olmsted*, *supra*.) If the crime is that the defendant sold liquor in the town of Richmond after the electors of that town had voted that no licenses should be granted, his sale was a violation of that law whether he had a certificate or not; but he is entitled to have that fact stated in the indictment so that he may know the precise nature of the charge made against him.

Therefore, as the indictment contained no such statement, it was manifestly defective and the demurrer should have been sustained; and for the error in refusing to sustain the demurrer the judgment must be reversed. It is unnecessary, therefore, to examine any of the other questions presented in the case.

The judgment must be reversed and the demurrer sustained and the indictment dismissed, without prejudice, however, to the submission of the case to another grand jury.

All concurred.

Judgment and conviction reversed, indictment dismissed and case directed to be submitted to another grand jury.

Court of Appeals. Reported. 167 N. Y. 113.

HENRY H. LYMAN, as Commissioner of Excise of the State of New York, Appellant, *v.* NICHOLAS SCHERMERHORN, Defendant, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Respondent.

Liquor tax certificate—When surety upon bond given upon application therefor not liable for false statement in application.

A surety upon a bond, conditioned that the principal will not violate any of the provisions of the Liquor Tax Law, given upon an application for a liquor tax certificate which falsely states that the applicant had never been convicted of a felony, does not guarantee the truth of the statement, and in the absence of knowledge of its falsity when it executed the bond, is not liable for the acts of the principal who had been previously convicted of a felony, in selling liquor under the certificate,

which at the election of the State was void *ab initio* under section 23 of the Liquor Tax Law, providing that no person who shall have been convicted of a felony shall traffic in liquor or be granted a liquor tax certificate, since such sales were, as to the surety, protected by the certificate until the assertion by the State of its invalidity.

Lyman v. Schermerhorn, 53 App. Div. 32, affirmed.

(Argued March 26, 1901; decided May 14, 1901.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 24, 1900, reversing upon the law a judgment in favor of plaintiff entered upon a verdict directed by the court at a Trial Term, but expressly affirming the facts.

The nature of the action and the facts, so far as material are stated in the opinion.

P. W. Cullinan for appellant. The principal on the bond violated the Liquor Tax Law during the life of the liquor tax certificate, and the surety thereby became liable to pay the penalty of the bond. (L. 1896, ch. 112, §§ 23, 34.) A liquor tax certificate is only a receipt for money paid. The right to traffic in liquors does not depend upon the certificate, but upon a compliance with the Liquor Tax Law. (*People ex rel. v. Hilliard*, 28 App. Div. 142; *Scalzo v. Sackett*, 30 Misc. Rep. 543; *Niles v. Mathusa*, 162 N. Y. 546; *McNeeley v. Welz*, 166 N. Y. 124.)

Frank H. Platt and *James Russell Soley* for respondent. The bond never took effect, because the certificate was void when it was issued to Schermerhorn. (L. 1896, ch. 112, § 23; *People ex rel. v. Higgins*, 151 N. Y. 570; *Toles v. Adees*, 84 N. Y. 222; *Haberstro v. Bedford*, 118 N. Y. 187; *Lyman v. Kane*, 57 App. Div. 549.)

LANDON, J. The plaintiff recovered judgment for \$700, the full penalty of a liquor traffic bond, made by Schermerhorn as principal and the respondent as surety under section 18 of the Liquor Tax Law, and filed April 28, 1898, by Schermerhorn with the county treasurer of Ulster county with his application under section 17 of the same law for a liquor tax certificate. In this application Schermerhorn falsely stated that he had never been convicted of a felony. Schermerhorn paid the liquor tax and the

county treasurer issued to him a liquor tax certificate for one year from April 30, 1898. In March, 1899, Schermerhorn sold liquor at the place named in the certificate to persons to be drunk upon the premises, and they drank the same thereon.

The bond recites that Schermerhorn is about to apply for a liquor tax certificate, and its condition is "that if the liquor tax certificate applied for is given unto the said principal, and the principal will not, while the business for which such liquor tax certificate is given shall be carried on, * * * violate any of the provisions of the liquor tax law, * * *" then it shall be void, otherwise of force.

Section 23 of the Liquor Tax Law provides that "no person who shall have been * * * convicted of felony * * * shall traffic in liquors or be granted a liquor tax certificate * * *." The recovery was had for a violation of this provision.

We assume that Schermerhorn had no right to traffic in liquor, either with or without a certificate; his legal disqualification was complete, and could not be removed by the certificate. The false statement upon which he procured it overreached the certificate itself, and at the election of the State rendered it void *ab initio*.

If the surety had known when it executed the bond that Schermerhorn had been convicted of a felony, then complicity with him in intending to violate the law, and in his subsequent violation of it by trafficking in liquors, would be a natural inference, and equal liability with him upon the bond would follow. But the surety did not know that Schermerhorn had been convicted of a felony. It did not guarantee the truth of Schermerhorn's statement. The suretyship results not from the surety's participation in the principal's wrong, but from the State's acceptance of it as right. The county treasurer had jurisdiction to pass upon the application, accept the bond, and issue the liquor tax certificate. As between the State and the surety, both acting in good faith, the bond had its inception and validity because the county treasurer acted within his jurisdiction in issuing the certificate. It is obvious that the State might never obtain knowledge that Schermerhorn's statement was false, or, obtaining it, might never act upon it, and thus as between the State and the surety both bond and certificate would continue to be valid. So long as the State insists upon the validity of the bond, it acts upon the truth of the application and the validity of the certificate. Schermerhorn's traffic in liquor,

here proved, was before the State asserted the falsity of the application and the invalidity of the certificate, and, therefore, as to the surety, the liquor tax certificate still protected such traffic.

Until either the State or surety takes some action with notice to the other that it elects to withdraw from the relation each has in good faith assumed to the other, that relation continues in the sense and meaning in which it was originally assumed. When the State changes its position with regard to the certificate and to the qualification of the certificate holder to traffic in liquors, while it may punish the latter because of his false statement and his sales while disqualified, it cannot punish his surety without convicting it of complicity with him. Such liability of the surety was not within the meaning or intent of the surety's obligation. The surety had no intent to give a bond for a convicted felon, and the State had no intent to ask or receive such a bond. The bond was given and received as for a person not disqualified. The position of the surety is no worse than that of the State. The surety did not pass upon the application, the county treasurer did, and the bond would have had no life or validity but for that officer's approval of the application; hence, when the State withdraws that approval and asserts that the certificate affords no protection to its holder, the bond which was given in consideration of such protection ceases to be supported by it. The application, certificate, and bond fall together. Until the State changed its position, the bond was good and the certificate good, as to the surety. Thus this sale of liquor in question was protected, and caused no breach of the surety's obligation.

The order should be affirmed, and judgment ordered for the respondent defendant upon the stipulation, with costs.

PARKER, Ch. J., GRAY, O'BRIEN, HAIGHT, CULLEN and WERNER, JJ., concur.

Ordered accordingly.

Supreme Court, Warren Special Term, June, 1901. Unreported.

In the Matter of the Application of JOHN H. PITKIN for a Writ of
Mandamus Against JOHN GLASSBROOK, et al.

John H. Cunningham, for relator.

W. G. Van Loon, for Deputy State Commissioner of Excise,
Maynard N. Clement.

HOUGHTON, J.: The moving papers show that the four local option questions were voted upon at the biennial town meeting in the town of Stony Creek, Warren county, April 2d, 1901, and that the vote was against the granting of licenses by majorities of from 51 to 19. The largest number of votes cast for any town officer was 262, and the largest number of votes cast for and against proposition No. 1 was 189, and there were of the various ballots cast 60 rejected for one reason and another.

It is conceded that no notice was posted, as provided by the Excise Law, of the filing of the petition or that the question of local option would be submitted to the voters, nor was there any publication of such notice in any newspaper in the county of Warren.

The relator alleges that the petition was defective, but, passing that question, I think that a notice that the questions are to be submitted to the voters, and the posting and publication of such notice, as provided in the Excise Law, is mandatory, and that any vote taken by the electors upon such questions is a nullity unless such notice, as provided by the statute, is given.

I have had occasion recently, in the matter of *Sullivan v. the Town of Moreau*, to examine the authorities, and there refused to set aside an order for the resubmission of the matter to the voters of the town, upon the ground that although there had been agitation of the temperance question in the town and news items in the newspapers circulated in the town, and although there had been temperance tracts and exhortations mailed to the various voters of the town, still there was not legal notice given of the submission of the questions, and my reasons for so holding are stated in the memorandum on that proceeding.

The town board of the town of Stony Creek is directed to reconvene and reject all ballots cast on the question of local option

at the town meeting held April 2d, 1901, and certify to the county treasurer of the county of Warren and the State Commissioner of Excise that no vote was taken upon such questions in that town.

Supreme Court, Jefferson Special Term, June, 1901. Unreported.

PEOPLE ex rel. JOHN SAVELL v. MAYNARD N. CLEMENT and
FRANKLIN M. PARKER.

CERTIORARI under section 28 of Liquor Tax Law, subdivision 1,
as amended by chapter 312 of 1897.

George A. Lawyer, for relator.

A. O. Briggs, for respondents.

MERWIN, J.: I am inclined to follow the view taken in *Matter of Getman*, 28 Misc. 451. Relator, therefore, is entitled to an order commanding the county treasurer to grant the application and issue certificate on payment of the tax.

The counsel for relator will prepare and submit to the other side a prepared order together with a copy of this memorandum and the same with any objection thereto by the defendants' counsel will be submitted to me for settlement and signing.

No costs allowed.

First Appellate Department, June Term, 1901. Reported. 62 App. Div. 616.

In the Matter of the Petition of HENRY H. LYMAN to Revoke the
Liquor Tax Certificate of TIMOTHY CROWLEY.

APPEAL from order by which a liquor tax certificate issued to one Timothy Crowley is revoked and cancelled.

Alfred R. Page, for appellant.

S. B. Mead, for respondent.

INGRAHAM, J. The State Commissioner of Excise presented to the Supreme Court a petition asking that a liquor tax certificate issued to one Timothy Crowley be revoked and cancelled. Crowley appeared and interposed an answer to the petition, in which he denied a violation of the Liquor Tax Law, and upon that answer an order of reference was entered to take proof of the facts stated in the petition. The referee reported the same to the court, and the court thereupon revoked and cancelled said tax certificate upon the ground that on the 3d of October, 1900, during the hours when the sale of liquor is prohibited by law, the said Crowley did have, keep and maintain in the windows and doors of his premises, screens, blinds, curtains, articles and things which prevented a view from the street of the bar and room on said premises where liquor was sold and kept for sale, and at said time did permit the doors of said premises to be opened and unlocked and did admit thereto persons other than members of his family, or his servants, and did sell to said persons and to divers other persons, at said time, liquor, contrary to the statute in such case made and provided.

It is not disputed but that these acts were in violation of the Liquor Tax Law, and if there is evidence to sustain this finding the court was justified in revoking such liquor tax certificate. There was testimony of several persons who were deputy superintendents of elections, that they went into the appellant's bar-room on the night of October 3, 1900, between one and two o'clock in the morning and there purchased and paid for whiskey and beer, which they consumed upon the premises. No reason appears for doubting their testimony, and it was sufficient to sustain the finding of the court below that the appellant had violated the Liquor Tax Law. The fact that they were public officers does not make them incompetent witnesses. The appellant testified that the description of the saloon as given by these witnesses was that of the saloon next door to his, and that his saloon was closed at one o'clock every night; that he never kept open after one o'clock; and he was corroborated by his barkeeper and waiters. This presented a question of fact but we do not think it sufficient to overcome the evidence produced on the part of the petitioner.

There was evidence received by the referee as to a violation of the Liquor Tax Law on a subsequent occasion, which it is claimed was incompetent. It appears from the opinion of the court at Special Term that this evidence was only considered upon the

question of the credibility of the appellant's witnesses, and we have not considered it for any purpose in the determination of this appeal; and without that evidence, we agree with the court below that a violation was proved.

The order appealed from should, therefore, be affirmed with costs and disbursements.

PATTERSON, McLAUGHLIN, HATCH and LAUGHLIN, JJ., concurred.

Court of Appeals. Reported. 167 N. Y. 391.

In the Matter of the Petition of GEORGE W. PECK, Respondent,
for an Order Revoking and Canceling Liquor Tax Certificate
No. 25,679, Issued to NORMAN B. CARGILL, Appellant.

1. Liquor Tax Law—Insufficient petition for revocation of certificate.

The Liquor Tax Law (Laws of 1896, chap. 112, § 28), authorizing any citizen to commence a summary proceeding to forfeit the right to carry on business on account of acts which constitute a crime, by a petition to a judge or the court, but expressly providing that the "petition shall state the facts upon which said application is based," is not satisfied or complied with by a petition which merely states that the petitioner is informed and believes that the particular facts exist or that the party charged has committed the forbidden act in violation of law, without even a statement of the sources of the information or the grounds of the belief, and, hence, such a petition furnishes no sufficient basis for the revocation of a liquor tax certificate.

2. Failure of holder to answer charges under oath does not authorize revocation of certificate in absence of proper petition.

The provision of the statute that after service of the petition and an order to show cause on the holder of the certificate five days before returnable, the judge before whom it is returnable shall revoke or cancel the certificate unless the holder shall present and file a verified answer raising an issue as to some material fact in the petition, in which event the judge is required to take proof of the disputed facts, but otherwise an order may be granted by default, does not dispense with a petition containing proper jurisdictional facts, and when there is a default authorize the court to revoke the certificate, since it is not within the power of the Legislature to dispense with the necessary allegations and proof of the facts constituting the offense by enacting virtually that no proof need be given by the State unless the party charged with the violation of the law denies the charges under oath.

Matter of Peck, 57 App. Div. 635, reversed.

(Argued April 15, 1901; decided June 11, 1901.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 8, 1904, affirming an order of Special Term revoking and canceling liquor tax certificate No. 25,679, issued to Norman B. Cargill.

The facts, so far as material, are stated in the opinion.

George D. Forsyth for appellant. The petition being wholly upon information and belief, presented no legal evidence which justified the court in making the show cause order. (*Roderigas v. E. R. S. Inst.*, 76 N. Y. 323; *Mowry v. Sanborn*, 65 N. Y. 581; *Martin v. Goss*, 4 N. Y. Supp. 437; *Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner & Slason*, 9 Paige, 305; *People ex rel. v. Pratt*, 22 Hun, 302; *Blodgett v. Race*, 18 Hun, 132; *Matter of Rochester*, 11 Abb. [N. C.] 122; *State v. Lanus*, 26 Me. 261; *Plummer v. Commonwealth*, 1 Bush. 2.) This order to show cause contained an injunction restraining the certificate holder from transferring his property in the certificate. Such an order cannot be issued without legal evidence or upon information and belief. (*Herman v. Goodson*, 18 Misc. Rep. 604; *Niles v. Mathusa*, 20 App. Div. 483.)

Nelson E. Spencer for George W. Peck, respondent. The petition complied with the statute, and the justice not only had jurisdiction, but was required, to make the order to show cause, as of course. (*People ex rel. v. McGowan*, 44 App. Div. 30.)

William E. Schenck for special deputy commissioner of excise.

O'BRIEN, J. This is an appeal from an order which revoked and canceled a liquor tax certificate held by the appellant.

These certificates are recognized by the statute under which they are issued as a species of property transferrable from one to another. They are the evidence of a right or privilege to carry on a certain kind of business, issued by the State to the individual, and hence a thing of pecuniary value. In this case the holder of the certificate has been deprived of it by the order appealed from, which revoked and canceled it. This has been done on the ground that he was guilty of a violation of the law by selling liquor on Sunday. The order so adjudges. No one has testified, or even alleged, that he committed that offense. The petitioner does allege that he is informed and

believes that the holder of the certificate has been selling beer, whiskey and wine "during the last three months" on Sunday, and that is absolutely the only allegation or proof in the record to uphold the order complained of. It is said that this is all that the statute requires, and that the certificate has been revoked by a proceeding authorized by law which has been literally complied with in this case. A statute which would permit the rights of a party to be summarily disposed of in that way would be of very doubtful validity. We think that the statute in question requires, upon any fair construction, something more. It does authorize any citizen to commence such a proceeding by petition to a judge or the court, but it expressly provides that the "petition shall state the facts upon which said application is based." (Liquor Tax Law, § 28.) When the law requires that the facts shall be stated, as the basis of a summary proceeding to forfeit the right to carry on business by reason of acts which constitute a crime, it is not complied with by the presentation of a petition, every allegation of which is upon information and belief, without even a statement of the sources of the information or the grounds of the belief. The liberty and property or personal rights of the citizen have practically no protection if they can be taken away or destroyed by such a proceeding on the part of any one who is willing to become a party to such a controversy, and without producing any proof whatever of the acts constituting the offense charged. The least that should be required in such a case is that the petition should state the facts positively upon oath, unless the statute expressly permits a statement upon information and belief, and this statute does not. A special statutory requirement, that a party must state certain facts as a basis for an order revoking a certificate of the right to carry on a certain business, is not satisfied or complied with by a mere statement that the moving party suspects or is informed and believes that the particular facts exist, or that the party charged has committed the forbidden acts in violation of law. This principle would seem to be specially applicable to a case like this, where the acts charged and which are at the foundation of the proceeding, not only subject a party to a penalty or a forfeiture, but are also crimes and punishable criminally. The statute now under consideration authorizes the judge, upon presentation of a petition stating the facts, to grant an injunction against a transfer of the certificate and an order to show cause. The petition does not confer jurisdiction unless it is

in compliance with the statute, and a petition in which all the material facts are stated upon information and belief, without disclosing the sources of the information or the grounds of the belief, is no sufficient basis for any judicial action. (*Murphy v. Jack*, 142 N. Y. 215; *Buell v. Van Camp*, 119 N. Y. 160; *Campbell v. Morrison*, 7 Paige, 157; *Cushing v. Ruslander*, 49 Hun, 19.)

But it is said that the statute expressly authorized the court, upon the proceedings in this case, to revoke the certificate. The contention is that the statute provides that after service of the petition and an order to show cause on the holder of the certificate five days before returnable, the judge before whom it is returnable shall revoke or cancel the certificate *unless* the holder shall present and file a *verified* answer raising an issue as to some material fact in the petition; in which event the judge is required to take proof of the disputed facts, but otherwise the order of revocation is granted by default. It is true that the statute so provides, but this does not dispense with a petition containing proper averments of the necessary jurisdictional facts. Moreover, it is plain that what the statute practically provides for is that in such cases the accused shall be presumed to be guilty unless he denies his guilt under oath. If he omits to deny the statements of the petition on oath, the facts charged are to be taken as confessed and a forfeiture follows. If the party against whom the proceeding is instituted is really guilty of the offense charged, he is thus compelled to confess his guilt either by his oath or by silence, and then the forfeiture of his property rights follow. He has no other alternative, unless he is tempted to tamper with his conscience and deny the truth on oath. It is not competent for the Legislature to place a citizen in such a disadvantageous position in order to protect his liberty or his property. In any proceeding by the State to deprive him of the one or the other the facts which in law justify it must be alleged and established. The Legislature has no power to enact that they may be inferred or presumed from the silence of the party accused or from his failure to answer under oath. This is especially true when the acts charged are not only the basis of a penalty or a forfeiture, but constitute a crime. It is the constitutional right of the party charged with the commission of acts which, if true, constitute a crime or create a penalty or impose a forfeiture to answer without verification. No law can

be valid which directly or indirectly compels a party to accuse or incriminate himself or to testify by affidavit or otherwise with respect to his guilt or innocence. In every case when he elects to remain silent with respect to any charge involving unlawful acts which are criminal or subject him to a penalty or forfeiture, that is a constitutional privilege which the Legislature may not invade. The courts have insisted upon giving to the constitutional provision a construction broad and liberal enough to permit a citizen to remain entirely silent with respect to the truth or falsity of any criminal charge against him, if he so elects, and his right to refuse to verify a pleading is as clearly within the privilege as his right to refuse to testify. The constitutional immunity from every species of incrimination may be as effectually violated by a law which compels a person to plead or deny upon oath any charge involving a criminal offense without regard to the form of the investigation as by a law compelling him to testify as a witness. The privilege of silence secured by the Constitution applies to the one case as well as the other. (*Thomas v. Harrop*, 7 How. Pr. 57; *Hill v. Muller*, 2 Sandf. 684; *People ex rel. Taylor v. Forbes*, 143 N. Y. 219; *Counselman v. Hitchcock*, 142 U. S. 547; *People v. Courtney*, 94 N. Y. 490; *People v. Sharp*, 107 N. Y. 427; *Gadsden v. Woodward*, 103 N. Y. 242.) The principles decided in these cases establish the proposition that it was not within the power of the Legislature to dispense with the necessary allegations and proof of the facts constituting the offense, by enacting virtually that no proof need be given by the State, unless the party charged with the violation of the law denies the charges under oath. The statute virtually authorizes a presumption of guilt from an omission of the accused to testify and, therefore, it is a law adjudging guilt without evidence and reverses the presumption of innocence. An enactment of this character violates fundamental principles binding alike upon the Legislature and the courts. (*People v. Courtney*, *supra*.)

The order appealed from should be reversed and the proceeding dismissed, with costs.

MARTIN, J. I concur upon the sole ground that the petition in this case does not state all the facts upon which the application is based otherwise than upon information and belief, without stating the source of the petitioner's information or the grounds of his belief. Although the allegations as to the sale of liquor

on Sunday are sufficient and not upon information and belief, other of the essential facts are not so stated, and hence the petition was insufficient to authorize the action of the judge in making the order appealed from.

I do not concur in this decision upon any other ground. While it has been said that a tax certificate possesses some of the elements of property, and to an extent may be so regarded, still it is at most a qualified property, subject to all the provisions of the statute and may be canceled or destroyed in the manner specified. In other words, the right of property is a conditional one, which is subject to all the contingencies provided for by the statute, among which is the liability of being canceled and annulled for any of the reasons and in the manner specified in the statute.

LONDON, J. (dissenting). I dissent. The tenure of a liquor license is conditioned upon the holder's observance of the provisions of the Liquor Tax Law, a tenure very different from that of the absolute ownership of property. The reason is plain: When he violates the law under which he receives his license, the holder perverts his license into an aid and cover for his violation, and makes it a weapon against the law, and himself a traitor to it. If the state which grants this kind of property for permissible uses, protects it as it does other property, it may aid the abuses it should suppress. This license holder practically invites the state to take that position. But the real position of the state is not that the license holder shall defend his innocence whenever challenged, but that the instituting of an inquiry into his guilt shall be open to every citizen, and its methods shall be adapted to ascertaining the truth instead of suppressing it. The license holder accepts this condition in accepting his license.

Section 28, sub. 2, permits any citizen to present a verified petition for the revocation of a liquor tax certificate. "Such petition shall state the facts upon which said application is based." The act does not in terms require the facts to be stated positively, or otherwise than upon information and belief. To require more would often result in encouraging the offender to continue his violations, and this the Legislature sought to prevent. If the license holder by a verified answer denies the charge, its truth must be judicially determined upon competent evidence. In this case he did not deny it, but took the same objections as if an attachment of his property was in question. For the reasons

stated the rules as to attachment are as inappropriate as they are inadequate.

PARKER, Ch. J., BARTLETT, VANN and CULLEN, JJ. (and MARTIN, J., in memorandum), concur with O'BRIEN, J.; LANDON, J., dissents.

Ordered accordingly.

(See *Erratum* in Vol. 168, of the New York reports on the page preceding Table of Contents.)

ERRATUM.

In the Matter of Peck *v.* Cargill, 167 N. Y. 397, the vote of the court should read "PARKER, Ch. J., BARTLETT, VANN and CULLEN, JJ., concur on first ground stated in opinion, (and MARTIN, J., in memorandum), with O'BRIEN, J.; LANDON, J., dissents."

The first proposition in the head note, therefore, is the decision of the court.

Supreme Court, Jefferson Special Term, July, 1901. Reported. 35 Misc. 406.

THE PEOPLE ex rel. E. BRAYTON GUERNSEY, Relator *v.* HENRY B. PIERSON et al., Composing the Board of Officers of the Town of Ellisburg, Respondents.

Election at a town meeting held by districts—Town law governs—Irregularities not fatal.

An election at a town meeting, in a town where such meetings are held by districts, on a day other than a general election day is not governed generally by the Election Law (Laws of 1896, chap. 909), but mainly by the Town Law.

The town canvassing board cannot be directed to convene, recanvass the votes cast at such an election (on the local option questions), and, in so doing, reject, for irregularities, returns from certain districts, unless the returns attacked are wholly void.

Where the people of a town have expressed their will at an election, it should not be overridden because of the negligence and carelessness of the town officers.

The following deviations from the Town Law (Laws of 1890, chap. 569, § 38, renumbered, and amended by Laws of 1899, chap. 168, § 2), were regarded by the court as not fatal:

That, in two districts, the inspectors selected one of their number as poll clerk;

That, in some districts, the poll lists were not subscribed as required by the statute;

That, in one district, the inspectors did not return how many ballots were void, it appearing that the void ballots were inclosed by them in a sealed package and filed with the statement of the canvass;

That, a supervisor of the town, who took no part in the canvass, was present at it and signed the statement of it.

APPLICATION for a peremptory writ of mandamus directed to the defendants composing the board of canvassers of the town of Ellisburg, requiring them forthwith to convene as a board of canvassers at the office of the town clerk in the town of Ellisburg, and recanvass the votes upon the questions submitted under the Liquor Tax Law at the town meeting held in said town on the 19th day of February, 1901, from the statements of the inspectors of the several election districts as delivered to them on or about the 20th day of February, 1901, and to reject, throw out and wholly disregard the statements and returns from the first, second, third and fifth election districts, and from any other, if any, in which the said election was not legally conducted by a properly constituted election board, and directing the defendant Hallett, as town clerk, to enter the result of such recanvass in the minutes and in the town records, as required by law in case of the original canvass of the votes of a town meeting; and further directing the said town clerk to immediately file with the State Commissioner of Excise, and also with the county treasurer of the county of Jefferson, a certified copy of the statement of the result of the vote as corrected by such recanvass.

Arthur L. Chapman, for motion.

Mason M. Swan and A. O. Briggs, opposed.

ANDREWS, W. S., J. It seemed to have been assumed upon the argument of this motion that the General Election Law of the State (L. 1896, ch. 909) is applicable to such an election as is here called in question. I doubt if this is so. Sections 18, 58, 63, 85, 86, 87, 111, 113, and perhaps others of this statute refer to, and to some extent regulate or affect town meetings not held on general election days; but mainly such meetings are governed entirely by the Town Law (L. 1890, ch. 569), except in so far as this latter act incorporates into itself the provisions of the

former statute. *Matter of Larkin*, 163 N. Y. 201. At town meetings the justices of the peace preside, and the town clerk acts as the clerk. A poll-list and minutes of the meeting, subscribed by the clerk and the presiding officers, are to be kept and filed in the town clerk's office. If, however, there is no general meeting and the town is divided into districts, the election inspectors in each district appoint a poll clerk and they and he have the same powers and duties as the justices and town clerk at general meetings.

When an election is held under such circumstances, at the close of the polls the inspectors canvass the ballots and make a statement of the number cast for each candidate and for or against every question or proposition. "The void and protested ballots, and the voted ballots other than void and protested shall be preserved and disposed of by the inspectors in the manner provided by section one hundred and eleven of the Election Law." L. 1899, ch. 168, § 2, amending Town Law, § 38. That is, they shall be enclosed in a sealed package and filed with a statement of the canvass. This statement is to be in the same form as statements made by inspectors at general elections. Its form is, therefore, fixed by the same section 111 and by section 84. There is to be first a return of all the ballots voted and number voted for each candidate or proposition; the number of ballots "marked for identification" shall be given, and also the number of ballots rejected as void. At the end shall be a certificate that the statement is correct. It is then to be delivered to the justices of the peace of the town and the town clerk, who shall convene and act as a town canvassing board.

The form of questions in regard to the sale of liquors, the way in which such questions shall be submitted and the manner in which ballots are to be prepared and furnished are regulated by section 16 of the Liquor Tax Law (L. 1896, ch. 112).

In determining whether or not this is a proper case for granting a peremptory writ of mandamus only those facts contained in the relator's papers which are undisputed may be considered. On the other hand all the relevant facts stated in opposition to the motion, and properly pleaded, are deemed to be true.

It appears that the relator is a resident of and a hotel-keeper in the town of Ellisburg, Jefferson county, and that until May 1, 1901, he was authorized to traffic in liquors in said town as a hotel-keeper under the Liquor Tax Law of the State. On May

eighteenth he applied to the county treasurer for a further certificate authorizing him to continue such traffic in liquors for the year ending May 1, 1902, but such application was refused. It further appears that the town of Ellisburg is divided into five separate election districts, and that at a town meeting held on February 19, 1901, the local option questions set forth in the Liquor Tax Law were properly submitted to the electors of the said town. As a result of such election and canvass made by the votes cast thereat the town clerk filed with the State Commissioner of Excise and with the county treasurer of Jefferson county, a certificate purporting to show that the majority of the votes upon all the questions so submitted was in the negative. It was in reliance upon this certificate that the application of the relator was refused by the county treasurer. Thereupon the relator makes this application claiming that the said election was, in many respects, irregular and that the canvass of votes made thereat, both by the district inspectors and by the town canvassing board, failed to comply with the statute.

In view of the decision of the Court of Appeals as to the law controlling town elections many of the objections as to the acts of the election inspectors become immaterial. But certain irregularities do appear. Perhaps the most important are the following:

1. The statute (L. 1899, ch. 168, § 2) requires the appointment of a poll clerk in each election district who is required to keep a poll list. The office of these clerks is distinct from that of the inspectors, and the intention of the law is that the two offices shall not be combined in the same person. Yet in two of the districts, at least, the inspectors selected one of their own number to act as poll clerk.

2. A poll list should be kept by the clerk and this list, subscribed by him and by the election inspectors, is to be kept and filed in the town clerk's office. These lists seem to have been made, but in some instances, at least, they were not subscribed in the method designated.

3. In the second district of the town this poll list shows that 228 persons voted upon the excise question. In the returns made by the inspectors less than that number of votes are accounted for. On the fourth question, for instance, which is the one in which the relator is interested, the returns show 113 votes "Yes" and 77 votes "No," making a total of 190. No

statement was made as to the missing 38 votes. But it appears from the affidavits presented on this motion that these 38 were blank and void. If so, the number of void ballots, at least, should be stated.

4. The town canvassing board consists of the justices of the peace of the town and the town clerk. One of such justices was not present at the canvass of the votes, but there was present one J. P. Wodell, the supervisor of the town. He, however, took no part in the canvass except to sign it as supervisor.

This being the condition of affairs, the relator claims that he should not be deprived of his right to traffic in liquors; while on the other hand the defendants claim that, whatever irregularities may have been committed, the people of the town have expressed their will and that the result should not be overridden because of the negligence and carelessness of the town officers. I agree with the defendants and think that the application should be denied.

The matters complained of do not enter into the essence of the election. They are matters of procedure concerning which the statute gives directions. The failure to comply with these directions, however, does not render the election void.

The relief asked for is that the town canvassing board be directed to convene and recanvass the votes, and upon such recanvass reject and disregard the returns from certain districts in which these irregularities occurred. This cannot be granted unless the returns complained of are wholly void. Otherwise the canvassing board has done its full duty. They are to canvass the returns made to it. They have no power to recall the inspectors and compel them to correct irregularities. If they met again they could only repeat what they have already done. As has been said, in two districts supervisors were elected to act as poll clerks. This was an irregularity, but the office was filled and the duties of the office were performed. The person so acting was, at least, a *de facto* officer, and the fact of his so acting seems to have cast no uncertainty on the result.

The poll lists also were not properly subscribed. But with them the town canvassers had nothing to do. If they were wholly lacking it would have been still their duty to have canvassed the vote upon the returns made by the inspectors.

So in regard to the void ballots. Apparently, such ballots were inclosed, as the statute directs, in a sealed package and

filed with a statement of the canvass. The failure of the inspectors to state in their return how many were void does not affect in any way the certainty of the result and should not be used as a pretext for overriding the express wish of the electors of that district.

The fact that the signature of Mr. Wodell was attached to the canvass made by the town board is immaterial. He was not a member of that body, but his presence in the room while they were performing their duties, and the addition of his signature to their certificate, does not vitiate their action.

The application for a mandamus is, therefore, denied, with ten dollars costs.

Application denied, with ten dollars costs.

Supreme Court, Broome Special Term, July, 1901. Reported. 35 Misc. 532.

Matter of the Application of FRANK E. GRIFFIN, for an Order under Section 16 of the Liquor Tax Law, Authorizing and Directing a Special Town Meeting, in and for the Town of Union, Broome County, N. Y.

Liquor Tax Law—Resubmission of local option because all the legal voters of a district had not opportunity to vote.

The statutory local option questions must be resubmitted to the people of a town where proof is made to the Supreme Court that, owing to the failure of the officers of the town properly and sufficiently to redistrict it, there was such congestion at the polls of one district that all its legal voters had not opportunity to vote at the annual town election upon the said questions and that a considerable number of electors were standing in line waiting to vote upon them when the polls closed.

MOTION or proceeding to set aside an annual town election, and application for a special election, asking for the resubmission to the people of the town of Union of the four questions under section 16 of the Liquor Tax Law.

Mangan & Mangan, for petitioner.

Radcliffe Park, for the Town of Union.

FORBES, J. This is a motion or proceeding to set aside an annual town election, and an application for a special election, asking for the resubmission to the people of the Town of Union, Broome county, N. Y., of four questions under section 16 of the Liquor Tax Law.

The difficulty in this contest arises, principally, from one cause. The Town of Union, prior to March, 1901, was composed of three election districts. The principal question arises out of the election in the first district, in that portion of said town known as the village of Lestershire.

It is apparent, from the moving papers and all the affidavits submitted, that the proper election officers of the Town of Union had neglected to redistrict said town prior to the submission of the question of local option, under the four propositions referred to; also that the village of Lestershire was composed of but one election district, known as the first election district of the Town of Union. The number of legal voters in said district was something more than 1,300.

At the time of the submission of the question of local option, on the 6th day of November, 1900, it is asserted that more than 200 legal voters, wishing to exercise the elective franchise, were deprived of their votes and were actually disfranchised, through the inadequacy of proper polling places and voting opportunities in said district; and that, while the election officers performed all of their duties, at said election, in receiving votes, still the number of legal voters was so great, that it was absolutely impossible for said officers to receive and record their votes, and that about 250 legal voters were standing in a line formed and ready to vote when the polls closed.

The policy of the law is that no legal voter shall be improperly and unnecessarily disfranchised; that all such voters shall have a fair opportunity to vote once, and to have that vote counted; and when that vote is so given and counted, it must fairly record the will of the voter and, therefore, of the people of the town, on the question of local option, to the end that the law in that respect may be impartially and rigidly enforced.

It was the duty of the proper town officials to so redistrict the town, as that all electors wishing to vote may have a fair opportunity to do so, and the expression of an opinion so made must be regarded on that subject as the highest law of the land. There should be no other sentiment about this proposition. The

law should be enforced, with a firm desire to do justice by all persons who are legal voters, who desire to vote.

There is but little doubt or even dispute in this case, that the electors of the village of Lestershire had no such opportunity; and that, as a matter of right, they must be permitted to use the elective franchise in a legal and proper manner.

“The very object of an election is to ascertain the popular will, not to thwart it. The object of the election law is to secure and preserve the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to promote justice and secure freedom of choice, not by technical obstructions to make the right of voting insecure and difficult.

“The votes of innocent electors should not be invalidated by irregularities, or unauthorized acts or omissions, on the part of public officers charged with the duty of preparing and printing official ballots, or furnishing proper and suitable polling places for the safe deposit and canvass of the votes of electors of the district.”

When the expression of the will of the people has been once fairly made, the courts and juries will never hesitate to enforce the law as it stands upon the statute. (*People ex rel. Hirsh v. Wood*, 148 N. Y. 142; *Matter of Stewart*, 155 id. 545.)

The last annual election in the Town of Union, when the four questions, under the Liquor Tax Law, were submitted to the people, must be set aside, and said election so far vacated that a resubmission to the legal voters of those four questions may be made under the law.

The prayer of the petitioner must, therefore, be granted, and a special election is hereby ordered to be held in said town, under and in pursuance of the statute in such case made and provided, to the end that the will of the people may be properly and legally expressed on the question of local option.

The motion is granted, with costs, and a proper order may be prepared accordingly.

Motion granted, with costs.

County Court, Rensselaer County, July, 1901. Reported. 35 Misc. 590.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* ELIZABETH
HAREN, Defendant.

Liquor Tax Law—Indictment imperfect only in form—Charging one crime—Joint sale of liquor and proof—Exceptions not appearing in the enacting clause of a statute need not be negated by the prosecution—L. 1896, ch. 112, § 31, subd. a, § 33; 1897, ch. 312, § 22—**Code Crim. Pro., §§ 265, 278, 279, 284, 285.**

An indictment, entitled "Supreme Court of the County of Rensselaer," is not demurrable for that reason, as the presence of the word "of" instead of "in," or a comma, will be deemed an "imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits," within Code Crim. Pro., § 285.

An indictment which, in one count, charges the crime of selling liquor on Sunday, and, in another, the crime of offering and exposing it for sale on Sunday, the description of the date, place, persons and goods sold or offered for sale, being identical in each count, does not charge two crimes, but different aspects of the single crime described in Laws of 1896, chap. 112, § 31, and subd. a.

A count, alleging that the defendant "unlawfully did sell to Charles H. Morris and to certain other persons whose names are unknown to the grand jury," charges only a joint sale to the persons indicated; the charge will be sustained by proof of one sale and not more than one sale can be proved under the count.

A count, otherwise sufficient, need not allege that the defendant was not a hotel keeper, nor that the alleged purchasers of liquor were not his guests, or that the sales were made to them in the barroom or other similar rooms, as these provisos or exceptions of the statute need not be negated by the prosecution since they do not appear in the declaratory or enacting portion of said section 31, as amended by Laws of 1897, chap. 312, § 22, but are found in a subsequent independent part of the section, and moreover do not relate exclusively to sales on Sunday.

DEMURRER to indictment.

Jarris P. O'Brien, assistant district attorney, for people.

Jeremiah K. Long, for defendant.

NASON, J.: The defendant in this case was indicted on the 10th day of April, 1901, by a grand jury of Rensselaer county, convened at the same time with the trial term of the Supreme Court, for a violation of the Liquor Tax Law, the indictment containing two

counts, one for the crime of selling liquor on Sunday, November 11, 1900, and the other for exposing liquor for sale on the same day.

The indictment, by order of the Supreme Court, was sent to the County Court of Rensselaer county, and upon arraignment in the County Court, the defendant demurred to the indictment upon various grounds. These grounds may be briefly discussed and disposed of seriatim.

First. The defendant's first ground of demurrer was that the indictment does not conform substantially to the requirement of section 265 of the Code of Criminal Procedure, in that there is no such court as the Supreme Court of the county of Rensselaer, the indictment being entitled "Supreme Court of the County of Rensselaer."

It would not seem that this defect should be allowed to invalidate the indictment. Section 284 of the Code of Criminal Procedure provides "The indictment is sufficient, if it can be understood therefrom: 1. That it is entitled in a court having authority to receive it though the name of the court be not accurately stated."

Section 285 provides, "No indictment is insufficient nor can the trial, judgment or other proceedings thereon be affected, by reason of an imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits."

This court can take judicial notice that there is only one Supreme Court which is organized and acting under the Constitution of the State; that such court, at certain designated times, holds its trial terms in Rensselaer county; for which grand juries are impanelled and summoned and at which they attend, and of all other constitutional provisions, rules, laws and statutes affecting our system of judicature and administration of criminal justice, and must, therefore, almost of necessity, conclude that this indictment was found in the Supreme Court of the State of New York, and that the presence of the word "of" instead of the word "in" or in place of a comma, was the result of pure inadvertence and clerical error on the part of the pleader. It would not seem that the defendant could possibly have been misled or prejudiced by such an unimportant defect, which must be deemed as a "mere imperfection of form" and can, therefore, be disregarded.

Secondly. A further ground of demurrer is that the indictment charges more than one crime, in that it charges in the first count the crime of selling liquor on Sunday, and in the second count charges the crime of offering and exposing for sale liquor on Sunday.

Section 278 of the Code of Criminal Procedure provides: "The indictment must charge but one crime and in one form, except as in the next section provided."

Section 279 reads: "The crime may be charged in separate counts to have been committed in a different manner, or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts."

In view, therefore, of the identity in the description of the date, place, persons, goods sold or offered for sale in the two counts, the only obvious and reasonable interpretation of the indictment is that the two counts present different aspects of the same transaction, and that only one punishment could be imposed upon a general verdict of guilty. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559.

Our attention has been called to section 33 of the Liquor Tax Law, which provides that "Any person engaged in the traffic in liquors * * * shall upon conviction of a violation of any of the provisions of this act be liable for and suffer the penalties imposed therein; * * * and each violation of any of the provisions of this act shall be construed to constitute a separate and complete offense, and for each violation on the same day, or on different days, the person or persons offending shall be liable to the penalties and forfeitures imposed by this act."

The identity of the transaction set forth in the first count with the transaction set forth in the second count, the same matter being simply differently characterized in each count, is plain on the face of the indictment. Both counts clearly refer to the one crime, and defined in the second paragraph of the introductory part of section 31 taken in connection with subdivision *a*; and it may be added that the allegation that the defendant "unlawfully did sell to one Charles H. Morris and to certain other persons whose names are unknown to the grand jury," in legal effect, charges a joint sale to the persons indicated and not separate sales, and that the charge will be sufficiently sustained by proof of one sale under the circumstances alleged to one or more, although proof of more than one sale under such an indictment

must be excluded. (*People v. Adams*, 17 Wend. 475; *People v. Harmon*, 49 Hun, 558; *People v. Huffman*, 24 App. Div. 239; *People v. Schmidt*, 19 Misc. Rep. 458; *People v. O'Donnell*, 46 Hun, 360; *People v. Satchwell*, 61 App. Div. 312.)

Thirdly. Another ground for demurrer is that each count fails to state facts sufficient to constitute a crime, required to be stated within the provisions of section 31 of the Liquor Tax Law, in that it fails to show "that the defendant was not a hotel keeper and that the persons to whom the sales of liquor are alleged to have been made, were not guests of the hotel and that such sales were made to them in the barroom or other similar hotel rooms."

This contention cannot be successfully maintained. The general rule is well settled that "Where the exception itself is incorporated in the general clause, * * * it is correct to say, whether speaking of the statute or private contract, that unless the exception in the general clause is negatived in pleading the clause, no offense or no cause of action, will appear in the indictment or declaration when compared with the statute or contract, but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated, without negating the exception or proviso, as a *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense." See *U. S. v. Cook*, 17 Wall. 175; *Fleming v. People*, 27 N. Y. 329; *Jefferson v. People*, 101 id. 20.

In other words, if all the elements of the offense as together set forth in the indictment constitute a crime as defined in the law or statute, then exceptions or provisos not appearing in the enacting clause which exempt certain persons from the operation of such law or statute, by reason of their character or condition, or that limit its generality as governing all cases to which it might otherwise be applicable, need not be negatived, and sometimes, even if the exceptions or provisos appear in the enacting clause if not necessary to be alleged as a part of a *prima facie* case, they need not be negatived, but must be proved as defensive matter.

In accordance with these views, the framing of an indictment so that all the elements involved in the definition of the crime may be made to appear and thus fulfill the laws of pleading with regard to negating or ignoring exceptions, may depend quite as much upon the phraseology and grammatical construction of

the statute as upon the logical connection of its parts. For it is not difficult to conceive many cases where, by simply transposing the location of certain clauses in the statute, provisos and exceptions that might otherwise be ignored in drawing an indictment would have to be expressly negatived, because they would thus become incorporated into the definition of the offense. According to this criterion, the pleader was under no necessity of negating in this indictment any of the exceptions of the statute as claimed by the defendant.

Section 31 of the Liquor Tax Law enumerates a large number of acts forbidden by statute and denounced as unlawful, among which we find the sale or offering for sale of liquor on Sunday. The declaratory part of each of these subdivisions of this section is in itself an enacting clause. Subsequent to this enumeration of misdemeanors, under the act, appear certain complicated and involved paragraphs that are grammatically quite independent of and disconnected from the matter immediately preceding it, and none of which are exclusively referable to any one of these prohibitions, but relate to groups of them. The first and second of these qualifying paragraphs, which secure to pharmacists and hotel-keepers the right of selling or disposing of liquor on Sunday under certain conditions, have no more reference to sales on Sundays than to sales on other days, between one and five o'clock in the morning, or on election day or upon agricultural fair grounds. See *People v. Crotty*, 22 App. Div. 75.

Under the authorities and upon the reasoning stated, therefore, it is impossible to interpret the statute as if these provisos or exceptions relating to pharmacists and hotel keepers were actually incorporated in the enacting clause restraining Sunday selling, and should, therefore, be negatived in an indictment charging that offense.

This defendant has been sufficiently apprised of the accusation that has been made against her by a particular description of her alleged offense, corresponding to the definition of the statute, and there would seem to be no good ground, reason or justice why the pleader should be compelled to allege in the indictment the absence of that which the defendant is compelled to prove as a matter of defense.

The demurrer must, therefore, be disallowed.

Demurrer disallowed.

Supreme Court, Onondaga Special Term, July, 1901. Reported. 35 Misc. 598.

Matter of the Application of STEPHEN CHENEY for an Order
Cancelling and Revoking the License of MARCUS A. MUCKEY.

Liquor Tax Law—Computation of radius of two hundred feet—Door of
saloon—Door cut to prejudice an applicant.

The entrance, from and to which, distance is to be computed in determining what buildings, if any, are within a radius of two hundred feet of a proposed saloon, is the one opening into the wall of the saloon building rather than a door set back from the wall in the entrance way.

Where the owner of a building, occupied exclusively for a dwelling, cut a new door thereto after the saloon keeper had paid his license fee and finished the door on the day when the certificate was issued and made the door apparently to affect the right to procure the certificate—which the said owner here contests—the court held that this new door could not properly be considered in determining the saloon keeper's right to a certificate.

PROCEEDINGS under the Liquor Tax Law.

Edward C. Wright, for petitioner.

William F. Rafferty, for defendant Muckey.

HISCOCK, J.: The report of the referee in this matter is confirmed, and the application for an order cancelling the liquor tax license in question is denied for the following reasons:

1. The entrance from and to which distance is to be computed for the purpose of determining what buildings, if any, are within a radius of 200 feet, is the entrance or opening into the wall of the building occupied as a saloon. Such entrance or opening in this case is controlling, rather than the location of the door set back from the wall in the entrance way.

2. The application for the license in question upon March 27, having been made, and the license fee having been paid before the new door in what is described in the proceedings as the parsonage was cut, the status of the application, in my opinion, is to be governed by the facts and conditions existing at and prior to that time, rather than by those which occurred thereafter. The fact that the petition was temporarily withdrawn for a few hours, in order to correct some error or irregularity, would not, in my

opinion, prevent the application from relating back to the time when it was originally made.

3. The new entrance to the building called the parsonage was cut and made through the efforts of the petitioner, and was completed upon the day when the license was granted and, apparently, after the original application was made upon that day. The facts seem to indicate that the new entrance was created for the purpose of affecting the right of the applicant to procure a license, and I do not believe that, under all of the circumstances of the case, such new entrance can be taken into account in determining his rights to a license. The petition is, therefore, dismissed.

Petition dismissed.

First Appellate Department, July Term, 1901. Reported. 63 App. Div. 206.

In the Matter of the Petition of CHARLES E. SCHUYLER, Appellant,
for an Order Revoking and Canceling Liquor Tax Certificate
No. 12,421, Issued to ERNEST RORPHURO, Respondent.

Revocation of a liquor tax certificate—Facts establishing the exception in favor of a hotel must be pleaded and proved—Service of a sandwich with beer.

Where a proceeding for the revocation of a liquor tax certificate is brought on the ground that the holder thereof unlawfully sold liquor on Sunday, the holder, if he intends to rely for his defense on the exception contained in section 31 of the Liquor Tax Law in favor of hotelkeepers, must plead and prove the facts bringing him within such exception.

The fact that the proprietor of the alleged hotel served a sandwich with each glass of beer sold by him on Sunday does not constitute the persons so served "guests" within the meaning of section 31 of the statute.

APPEAL by the petitioner, Charles E. Schuyler, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 24th day of January, 1901, denying his petition for the revocation of a liquor tax certificate issued to Ernest Rorphuro, and also from a judgment entered in the clerk's office of the county of New York on the 26th day of January, 1901, upon said order.

J. Aspinwall Hodge, Jr., for the appellant.

George H. Taylor, Jr., for the respondent.

HATCH, J.: This proceeding was taken under section 28, subdivision 2, of the Liquor Tax Law (Laws of 1896, chap. 112, as

amended by Laws of 1900, chap. 367). It is admitted that the respondent had a liquor tax certificate duly issued to him under subdivision 1 of section 11 of the Liquor Tax Law permitting him to traffic in liquors at Nos. 2835, 2837 and 2839 Broadway, in the borough of Manhattan, New York, for a term of twelve months from May 1, 1900, which, at the time the proceeding was instituted, had not been surrendered or canceled, nor transferred in accordance with the provisions of the Liquor Tax Law. Violations of the law in two particulars are alleged, viz., selling liquors on Sunday contrary to the provisions of the statute, and having open the entrance to his bar on Sunday for purposes other than those permitted by the statute. The answer puts in issue these averments.

The matter was referred to a referee to take proofs in relation thereto and report the evidence to the court. The referee took the proofs and reported the same to the court with the testimony taken by him, and upon the coming in of the report the Special Term denied the application without opinion and without making any findings of fact or conclusions of law. From the order thereupon made and entered the petitioner appeals to this court.

It is important that we determine first whether or not the record shows that the respondent kept a hotel, for upon that fact the determination of this appeal largely depends. It is contended by the appellant that the respondent has not brought himself within exception of section 31 of the Liquor Tax Law (as amended by Laws of 1897, chap. 312), which provides that "the holder of a liquor tax certificate under subdivision one of section eleven of this act, who is the keeper of a hotel, may sell liquor to the guests of such hotel, * * * with their meals, or in their rooms therein, except between the hours of one o'clock and five o'clock in the morning, but not in the barroom or other similar room of such hotel." The section then defines a hotel, the meaning of the term "guest" as used in the act, and the exemptions of hotel-keepers from certain provisions of the law. A guest is defined as (1) "A person who in good faith occupies a room in a hotel as a temporary home, and pays the regular and customary charges for such occupancy, but who does not occupy such room for the purpose of having liquor served therein; or (2) A person who during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time, in good faith, a meal therein."

The rule is well established that if a party relies upon the exception contained in the part of section 31 in favor of hotel-keepers, *bona fide* clubs, etc., he must plead and prove the facts bringing him within the exception. (*Matter of Lyman*, 28 App. Div. 127.) It is insisted that the respondent has not complied with this rule. The petitioner avers that the respondent made application "for a liquor tax certificate to traffic in liquors * * * under subdivision one of section eleven of the Liquor Tax Law," and filed a bond in the penal sum of \$1,600, and paid the deputy commissioner the sum of \$800, and that such commissioner did, pursuant to section 19 of the Liquor Tax Law, issue to the respondent a certificate "showing that the excise tax had been paid by the said Ernest Rorphuro to traffic in liquors as specified in said statement and application." These allegations are admitted by the respondent in his answer, but the answer contains no averment that the place at which said Rorphuro was to carry on the business of trafficking in liquor under the certificate was a hotel, or that he was a hotelkeeper, or that his application so stated, nor any other fact bringing the place or himself within the exceptions and immunities granted to hotelkeepers by the statute. The deputy commissioner of excise also answered the petition, and averred that he duly issued to respondent a certificate under subdivision 1 of section 11 of the act, but he does not aver that the business was to be carried on in connection with the keeping of a hotel, nor that the requirements of the statute defining hotels (§ 31) had been complied with. All that is made to appear by the petition and answers, therefore, is that the respondent had a certificate duly issued to him to traffic in liquors under subdivision 1 of section 11 of the Liquor Tax Law. As that subdivision applies generally to the business of trafficking in liquors to be drunk on the premises where sold, whether in a hotel, restaurant, saloon, store, shop, booth or other place, and the rights of the holders are different, depending upon the character of the business in connection with which the traffic in liquors is to be carried on, it is apparent that it is essential, if the complaint is for an act which would be a violation of the act if committed in a saloon, store, shop or booth, but not if committed in a hotel by one carrying on the business of a hotelkeeper, that the person against whom the complaint is made plead all of the material facts bringing him within the exception, if he seeks to rely upon such an exception as a defense. The principal charge in this case

is selling liquor on Sunday, and it is manifest that the respondent was not entitled to prove that he was engaged in keeping a hotel at the place designated in the certificate, and the reception of evidence of such fact was error.

However, if he had been entitled to interpose the defense, he utterly failed to show the facts constituting the place a hotel within the requirements of the statute. Testimony was received over the objection of counsel that the place was conducted as a hotel; that respondent conducted a hotel and dancing pavilion; that there was a dining room and twelve or thirteen rooms upstairs; that the dimensions of some of the rooms were eight feet by twelve and some were larger, and that they were furnished and people could and did live in and occupy them. This evidence, made up as it is largely of conclusions, giving it as liberal a construction as may be, falls far short of proving the facts required by section 31 of the Liquor Tax Law, and does not even tend to prove that the certificate authorizing the trafficking in liquors was issued to respondent as the keeper of a hotel. It is equally consistent with the fact that his application might have shown that he was a saloon keeper or a restaurant keeper, and the certificate issued to him as such.

It follows that, as the testimony shows conclusively that liquor was sold and drunk on the premises on Sunday, a day on which sales are strictly prohibited by the statute, except under conditions which, as shown, the respondent has not brought himself within, the prayer of the petitioner should have been granted and the certificate issued to the respondent should have been revoked and canceled.

We are further of the opinion that had it been averred and proved by the respondent that he was entitled to the immunity granted to a hotel keeper, the evidence as to what took place on Sunday, May 20, 1900, shows a clear violation of the law. It appears that the premises where the respondent carries on business and mentioned in the certificate consist of a low, wooden two-story building, with a bar in one corner, and in the rear an open dancing platform covered by a tent. In this pavilion or tent drinks and sandwiches or other victuals if ordered are served at small tables. There is a "bouncer" and also signs with rules against swearing, which, it is contended, show the manifest determination of the proprietor to maintain the eminent respectability of his "place." On the afternoon of the Sunday men-

tioned, at three-thirty o'clock, two witnesses testify that they went into the pavilion and sat down at one of the empty tables and called for two glasses of beer which were served to them. They testify that they ordered nothing to eat and that nothing was served to them but beer. Men and women were inside drinking at other tables; dancing was going on in the centre of the platform and the music was playing. At about eleven o'clock in the evening they returned there and remained about one hour. On this visit they bought, paid for and drank beer; nothing but beer was ordered nor was anything to eat served them. The same conditions were in evidence as in the afternoon, singing, dancing, drinking and disorderly conduct. It is not denied by the respondent that he sold the drinks to the witnesses as testified by them, nor does he pretend that they were served with a regular meal in the dining room or in their private room, but he seeks to make it appear that every one who procures a drink at his "hotel" on Sunday must become his "guest" by partaking of a *bona fide* sandwich at least, and that the custom must have been followed in this instance. Let us give him the benefit of the doubt and assume that a real sandwich was served with each glass of beer, do the facts then constitute the persons served "guests" within the meaning of the statute? Did they resort to this "hotel" during the hours when meals were regularly served therein for the purpose of obtaining, *in good faith*, a meal therein? We think not, but that the evidence shows that the serving of sandwiches under such circumstances was a mere pretext to evade the law, it is not serving a meal in good faith, nor does it constitute the respondent the keeper of a *bona fide* hotel, so as to entitle him to the protection of the exception contained in the law. (*Matter of Lyman*, 28 Misc. Rep. 408.)

The custom of trafficking in liquor on Sunday after the manner of the respondent (by his own showing) is too clearly contrary to the express provisions of the statute to bear scrutiny and should not be countenanced. It follows that the order appealed from should be reversed, with costs, and an order granted revoking and canceling the certificate of the respondent, with costs.

PATTERSON, O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with costs, and order granted revoking certificate of respondent, with costs.

Second Appellate Department, July Term, 1901. Reported. 63 App. Div. 442.

In the Matter of the Petition of THOMAS J. WHITTAKER, Respondent, for an Order to Revoke and Cancel the Liquor Tax Certificate Granted to THOMAS A. KERBY, Appellant.

Forgery—Signature to a consent that a liquor tax certificate be issued—Preponderance of proof.

In a proceeding for the cancellation of a liquor tax certificate instituted on the ground that the alleged signature of the owner of a dwelling, within 200 feet of the nearest entrance to the premises, to a written consent to the issuance of the certificate, was a forgery, the owner testified that he had been a prohibitionist for forty years, and that he would not sign such a paper for anybody and that he would almost as soon sign his own death warrant. He also stated that he did not recollect ever seeing the person who purported to have signed the consent as a subscribing witness, but stated it was barely possible that he had signed the consent and did not recollect it; he further admitted that the signature to the consent looked like his and signed his name twice in court.

The person who purported to have signed the consent as a subscribing witness testified that he secured the owner's signature to the consent at the latter's residence and gave a minute and circumstantial account of the transaction. His testimony was supported by a comparison of the disputed signature with the genuine ones.

Held, that a finding that the owner did not sign the consent was opposed to the clear preponderance of evidence and that the proceeding should be dismissed.

APPEAL by Thomas A. Kerby from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 6th day of August, 1900, revoking and canceling the liquor tax certificate issued to him.

Emanuel Newman, for the appellant.

Edwin C. Schaffer, for the respondent.

SEWELL, J. The appellant presented to the special deputy commissioner of excise an application for a liquor tax certificate, which stated that there was but one building occupied exclusively as a dwelling within 200 feet of the nearest entrance to the premises where the traffic in liquor was intended to be carried on. Attached to and filed with the application was a consent in writ-

ing that the traffic in liquor be so carried on in such premises, purporting to be signed by Silas W. Albertson, the owner, in the presence of Abram J. Jackson as subscribing witness. The special deputy commissioner of excise issued the certificate, and sometime thereafter the petitioner commenced this proceeding to cancel it on the ground that the alleged signature of Silas W. Albertson was a forgery. The petitioner made no proof except by the testimony of Albertson, who testified that he did not sign the application or consent; that he would not sign any such paper for anybody anywhere, to sell liquor in this country or in any country; that no one approached him or asked him to sign it to his recollection, and added: "I think it would hardly be possible without my recollecting it, but still it might be; it is possible, barely so. I think I should have remembered it, but I am sure I would not sign it. I would almost as soon sign my death warrant." He also testified that he was a prohibitionist and had been for forty years. On cross-examination he testified that he did not recollect ever seeing Jackson, the subscribing witness, or of his calling upon him; would not say that he did not, or that when Jackson asked him to sign the paper he did not tell him what it was, or that he first refused to sign it and then said: "I may do it." He also stated: "It is possible that he might have asked me and I might have forgot it." He admitted that the signature looked like his, and signed his name twice in court at the request of the appellant's attorney, who offered these signatures, as well as the disputed signature, in evidence. The testimony of this witness was not corroborated in any circumstance, but was contradicted in every particular by Jackson, the subscribing witness, who testified to the details and incidents of his trip to Albertson's residence; that Albertson was at dinner; that he at first refused to sign, saying he was opposed to anything like it, but after being argued with said: "'Well, I'll sign it.' He took me into another room, an outside, vestibule room; he had his desk there, right by the window, facing the road; he took a pen and signed it in my presence. I told him I was very much obliged to him and would never forget his kindness."

The rule is that he who has the affirmative must determine it by a fair preponderance of proof, otherwise he fails to make out his case. Remembering this well-settled doctrine we are of opinion, after a careful consideration of the evidence in the case,

that we should reverse the findings of the learned trial court on the question of the fact submitted to him, on the ground that it was against the clear preponderance of evidence.

In *Losee v. Morey* (57 Barb. 561) it was held that where the plaintiff and defendant are sworn and contradict each other directly upon a question of fact, and their testimony is wholly irreconcilable, in the absence of other testimony, the case will stand evenly balanced and the complaint will be dismissed. (*Syms v. Vyse*, 2 N. Y. St. Repr. 106; *Raines v. Totman*, 64 How. Pr. 493.)

The record in this case does not disclose an evenly balanced case, and the testimony of Albertson is far from satisfactory. He admitted that the disputed signature looked like his, but insisted that it was not his signature because he was a prohibitionist and had been for forty years, and would not sign such a paper. Opposed to this testimony was the minute and circumstantial testimony of the subscribing witness, which is supported by the comparison of the disputed signature with the signatures made in court for that purpose. Such comparison shows plainly that the signature to the consent is genuine. It corresponds with the admitted signature in formation, the slant of the letters, and in general appearance. The only variation between the disputed and the admitted signatures can be accounted for by difference in pen, ink, position of the writer, or by different conditions under which they were written. It is a circumstance worthy of note that the two signatures made in court differ more than the disputed and either of the other signatures. There is some diversity in the marks of the pen, the size of the letters, and the space occupied by the signature, but no man ever signed his name with invariable uniformity in the ordinary course of writing it. It would require a vast amount of credulity to believe that these signatures were not written by the same person, and we are, therefore, constrained to believe that the owner of the property signed the consent as testified to by the subscribing witness.

The order must, therefore, be reversed and the proceeding dismissed, with costs.

All concurred, except WOODWARD, J., not sitting.

Order reversed and proceeding dismissed, with ten dollars costs and disbursements.

Fourth Appellate Department, July Term, 1901. Reported. 63 App. Div. 512.

In the Matter of the Application of JOHN B. O'HARA for a Writ of Mandamus.

JOHN G. LANGHAM and Others, Constituting the Board of Inspectors of Election of the Town Election held in the Town of Fleming, Cayuga County, N. Y., February 19, 1901, Appellants; JOHN B. O'HARA, Respondent.

Local option—A failure of the clerk to post notice renders the submission void—The remedy is to call a special town meeting.

The failure of a town clerk to post and publish notice that the local option questions would be submitted to the electors of the town at the town election as required by section 16 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1900, chap. 367) renders the submission void.

The proper practice in such a case is to resubmit such questions at a special town meeting called pursuant to said act, and not to issue a writ of mandamus requiring the board of inspectors of election to reconvene and to reject all ballots received by them for or against the questions.

APPEAL by John G. Langham and others, constituting the board of inspectors of election of the town election held in the town of Fleming, Cayuga county, N. Y., February 19, 1901, from an order of the Supreme Court, made at the Cayuga Special Term and entered in the office of the clerk of the county of Cayuga on the 29th day of April, 1901, granting a peremptory writ of mandamus requiring them to reconvene and reject all ballots received by them for and against the four propositions provided for by the Liquor Tax Law of the State, and to certify such rejection and file the same with the town clerk of the town, and requiring the town clerk to file such statement in his office and to cancel the former certificate on the subject and to file certified copies of such new certificate in the offices of the State Commissioner of Excise and the county treasurer of Cayuga county, and also a statement showing the cancellation of the former certificate.

Frank E. Cady and Robert L. Drummond, for the appellants.

Frank M. Leary, for the respondent.

WILLIAMS, J.: The order appealed from must be reversed with costs.

The ground of the application for the writ was that the town clerk did not comply with the statute by posting and publishing notice that the four questions were to be voted upon at the town election.

There was no dispute as to the fact that there was a failure to give such notice, but it is claimed,

First. That the statutory direction to give such notice was directory and not mandatory, and did not render the election upon this subject void.

Second. That no injury resulted from such failure because all the electors were present and voted, and the majority was large, and, therefore, the result should not be disturbed.

Third. That mandamus is not the proper remedy.

As to the remedy we are of the opinion that the relief afforded by this order was improper. Mandamus issues to compel the performance of duties which should have been performed, but which were neglected. When the several ballots on local option were presented to the inspectors on election day they were bound to receive them. They were regular, legal ballots, upon their faces, and the inspectors had no legal right to reject them because of the neglect of the town clerk to give the proper notice that local option would be voted upon at that election. The remedy for a failure to properly submit the question at the town election was the resubmission thereof at a special town meeting duly called (Liquor Tax Law, Laws of 1896, chap. 112, § 16, as amd. by Laws of 1900, chap. 367), and if the inspectors had no power to reject the ballots on election day the court had no power thereafter to compel them to reconvene and reject them. This remedy was employed in the *Eggleston* case, cited below, but this question was not considered.

Upon the merits we think we are controlled by the case recently decided in this court. (*Matter of Eggleston*, 51 App. Div. 38.)

We determined in that case that the notice must be given as required by the Liquor Tax Law in order to render the election valid, and we must adhere to that rule here. That case was decided under the law as it stood prior to the amendment of 1900, while this case arose since such amendment. The changes, however, are immaterial upon the question here involved. The law as it stood in 1899 provided for a resubmission if the first sub-

mission was for any reason improper, while the amendment of 1900 provides for a resubmission if the first submission was, for any reason except failure to file any petition, improper, and the amendment of 1900 also cured an apparent defect in the old law, by providing that the petition should be filed with the town clerk and he should give the notice. We held in the *Eggleston* case that under the law as it existed in 1899 the petition should be so filed and notice given. We conclude, therefore, that the question of local option was not properly submitted at the town election, but that the mandamus in question was not the proper remedy, and, therefore, the order granting the same should be reversed, with costs.

All concurred; RUMSEY, J., in a separate opinion.

RUMSEY, J. (concurring) :

This case was decided at the Special Term, where the order was granted upon the authority of *Matter of Eggleston* (51 App. Div. 38), decided by this department at the April term, 1900, where the same relief was granted with respect to another town. So far as that case construes the Liquor Tax Law, it must be followed by this court, and I not only have no desire not to follow it, but I think it is right. But I do not see just where the court gets the power to require a town board to meet and reject ballots. That question is not discussed or examined in the *Eggleston* case, and it seems to me that it is a matter of so great importance that that case should not be followed without a careful examination of the question.

It is undoubtedly the rule that a writ of mandamus should not be granted where the defendants have no authority to do the act, their performance of which is sought to be compelled. (*People v. Supervisors of Greene county*, 12 Barb. 217.) I am not aware of any authority granting to town boards, or to any other canvassing board, the right to reject ballots cast at an election, unless upon their face they appear to be void, and even in that case their action is subject to review by the courts. But where the ballots are regular in form and have been properly cast, and are found in the ballot box, I am not aware of any authority in the town board to refuse to canvass them. It is none of their business whether the preliminaries to the question voted upon have been properly taken or not. If they find the ballots in the box they are bound to count them if they are regular in form, and the

question whether they are effectual to carry out the wishes of the electors is one to be decided by another authority than they.

The duty of the canvassers under the Town Law is prescribed by section 37 of that law. It directs the canvassers to canvass the votes publicly, and before opening them they must be compared with the poll list, and the like proceedings shall be had as to ballots folded together and differing in number, as are prescribed in the General Election Law. (1 Heydecker Gen. Laws, 1414.) Those proceedings are to be found in section 110, subdivision 1, of the General Election Law. (1 Heydecker Gen. Laws, 381.) The requirements as to the canvass of the votes are found in section 110, subd. 3, page 385 of the volume aforesaid. Nowhere are the canvassers given any authority to refuse to count any ballot, but they are required to count every one, and preserve them.

Neither is any power to reject ballots given them by section 16 of the Liquor Tax Law, which provides for the submission of these questions to the electors of the towns. It is manifest that any power given to the canvassers to reject ballots, on their face correct, on the ground merely that a required preliminary notice had not been given by the proper official would be exceedingly dangerous, and would put it in their power to absolutely control the right of suffrage. If the Secretary of State should not issue such instructions as might seem to a board of canvassers to be fit, they might refuse to count any of the ballots cast for Governor of the State and thus defeat the will of the voters.

It is quite clear to my mind that any order of the court which recognizes such a right should be based upon some express provision of the statute, and no such power should be put into the hands of the canvassers of the votes of a town unless the statute requires it. For this reason, while I think the *Eggleston* case is undoubtedly the law so far as it says that these questions were not properly submitted to the electors, and, therefore, that the town has failed to determine whether any certificates should be granted or not, yet I do not think that it is within the power of the court by mandamus to require the town board to meet and reject these ballots.

For these reasons I think that the *Eggleston* case should not be followed in this respect, and for that reason alone the order should be reversed.

Order granting writ of mandamus reversed and motion denied, with fifty dollars costs and disbursements.

Court of Appeals. Reported. 168 N. Y. 43.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, *v.* THOMAS H. CHEEVER and UNITED STATES GUARANTEE COMPANY, Appellants.

Liquor Tax Law—Action upon bond for violation of law after surrender of certificate.

An action to recover the penalty of a bond given upon the procurement of a liquor tax certificate, for a violation of the law after the certificate has been surrendered, is not maintainable.

Lyman v. Cheever, 52 App. Div. 635, reversed.

(Argued June 3, 1901; decided July 10, 1901.)

APPEAL, by permission, from a judgment entered June 27, 1900, upon an order of the Appellate Division in the fourth judicial department, affirming an interlocutory judgment overruling a demurrer to the plaintiff's complaint.

The following is the question certified: "Does the complaint in this action state facts sufficient to constitute a cause of action, to wit, a breach of the condition of the bond in question?"

The nature of the action and the facts, so far as material, are stated in the opinion.

John De Witt Warner for appellants. The complaint does not allege that Cheever violated any provision of the Liquor Tax Law while the business, for which the certificate was given, was carried on. (*Lyman v. Schermerhorn*, 53 App. Div. 32; *Lyman v. Kane*, 57 App. Div. 549; *Matter of Lyman*, 59 App. Div. 217.) The complaint shows on its face that the alleged violations did not occur until after the business had ceased for which said liquor tax certificate was given. (*Lyman v. Schermerhorn*, 53 App. Div. 32; *Luddington v. Pulver*, 6 Wend. 404; *People v. Chalmers*, 1 Hun, 683; *Berry v. Schaad*, 28 Misc. Rep. 389; *Matter of Lyman*, 59 App. Div. 217; *Matter of Klevesahl*, 30 Misc. Rep. 361; *Matter of Lyman*, 160 N. Y. 96; *Vil. of Cortland v. Howard*, 1 App. Div. 131; *People v. Pillion*, 78 Hun, 74.)

Nevada N. Stranahan for respondent. The certificate is not actually surrendered at the time it is tendered to the issuing officer for surrender, as all rights in or under it may be lost if

proceedings based on violations of the law are instituted against the holder within thirty days after receipt of the certificate by the state commissioner of excise. (*People ex rel. v. Lyman*, 156 N. Y. 407.) The acts alleged in the complaint each constitute a breach of the bond. (*Lyman v. Perlmutter*, 166 N. Y. 414.)

HAIGHT, J. The demurrer interposed to the complaint was upon the ground that it failed to state facts sufficient to constitute a cause of action. The action was brought to recover the penalty on a bond given by defendant Cheever as principal, and the defendant, the United States Guarantee Company, as surety, to procure a liquor tax certificate. The complaint, in substance, alleged that on the 30th day of April, 1898, a liquor tax certificate was issued to defendant Cheever upon his giving the bond in question in the sum of \$1,000, conditioned, among other things, that the said Cheever would not, while the business for which said liquor tax certificate was given should be carried on, violate any of the provisions of the Liquor Tax Law; that the said Cheever carried on the business of trafficking in liquor upon the premises described in the certificate until the first day of September, 1898, on which day he surrendered the certificate to the special deputy commissioner of excise for cancellation and rebate, as provided by section 25 of the Liquor Tax Law. The complaint then proceeds to allege that thereafter, and on the 20th, 22d and 23d days of September, 1898, and within thirty days of the date of the surrender of the certificate, the defendant Cheever sold liquor and beer to be drunk on his premises without having his liquor tax certificate posted, as required by the Liquor Tax Law, and that he had not ceased to traffic in liquors, as provided by section 25 of that law.

The Special Term appears to have been of the opinion that the allegation of the complaint to the effect that the defendant Cheever had not ceased to traffic in liquor constituted a breach of the condition of the bond, and that, therefore, a sufficient cause of action was stated; but this allegation of the complaint must be taken in connection with that which precedes and follows. The pleader first alleged a sale of liquor on the 20th day of September, 1898, by the defendant Cheever to one Emmons J. Swift without having his liquor tax certificate "posted up and displayed in the room or bar of the premises where the traffic in liquors was to be carried on, and that said Cheever had not

ceased to traffic in liquors as provided by section 25 of said Liquor Tax Law after the surrender of said liquor tax certificate." As we understand this allegation a specific offense is charged as having been committed on the 20th day of September, 1898, and because of such offense the defendant Cheever had not ceased to traffic in liquors as provided by the statute. In other words, the latter allegation was intended to be a conclusion of law based upon the act alleged to have occurred on the 20th. We think the same construction should be given to the eighth paragraph of the complaint. We thus have the question presented as to whether an action can be maintained to recover the penalty of a bond, given upon the procurement of a liquor tax certificate, after the liquor tax certificate has been surrendered, for a violation of the law thereafter occurring. Under the Liquor Tax Law each corporation, association, copartnership or person who has made application for a permit to traffic in liquor is required to give a bond to the People of the State in the penal sum of twice the amount of the tax for one year conditioned "that if the tax certificate applied for is given the applicant or applicants will not, while the business for which such tax certificate is given shall be carried on, suffer or permit any gambling to be done in the place designated by the tax certificate in which the traffic in liquors is to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law; and that all fines and penalties *which shall accrue during the time the certificate applied for is held*, and any judgment or judgments recovered therefor, will be paid, together with all costs taxed or allowed." (§ 18.) The object and purpose of the bond, we think, is made quite apparent by the provisions of this statute. The surety thereto becomes obligated to see that the premises do not become disorderly and that no gambling is carried on therein and that the Liquor Tax Law shall not be violated during the time in which the business shall be carried on under the certificate and that all fines and penalties *which shall accrue during the time the certificate is held* shall be paid, etc. As we have seen, the certificate in this case was surrendered on the first day of September, 1898, twenty days prior to the alleged violation of the law complained of. From the date of its surrender it was no longer held by Cheever as a certificate or a permit under which

he could continue the traffic in liquors. All fines and penalties theretofore accruing during the time the certificate applied for was held by Cheever, the surety was bound to pay. For this reason section 25 of the law, in making provisions for the surrender of a certificate, prohibits the return of the rebate until after the expiration of thirty days from the date of the surrender, so as to give reasonable time to determine whether the person surrendering the certificate has been guilty of a violation of the law and in consequence is not entitled to a return of a rebate. This provision, however, has no bearing upon the liability upon the bond, for that instrument continues under the provisions of the statute for one year, the time for which the certificate was issued, or in case of its surrender previous to that time during the time for which it *is held*. Fines and penalties theretofore accruing may be recovered under the bond, not for offenses thereafter committed. We have not overlooked the case of *People ex rel. Miller v. Lyman* (156 N. Y. 407). The decision in that case was rendered by a divided court, and we are now of the opinion that the doctrine of that case should not be extended beyond the question decided. In that case the question as to the right to the return of the unearned liquor tax was involved and not the question as to the right to recover a penalty under the bond. The two cases are clearly distinguishable.

The interlocutory judgment should be reversed, with costs, and the question certified answered in the negative.

PARKER, Ch. J., BARTLETT, LANDON, CULLEN and WERNER, JJ., concur; VANN, J., not voting.

Judgment reversed.

County Court, Orleans County, August, 1901. Reported. 35 Misc. 735.

Matter of the Petition of EDWARD F. WOOLSTON and JOHN LUDLUM for an Order Requiring a Special Town Meeting to be Held in the Town of Yates under the Provision of the Liquor Tax Law.

Liquor Tax Law—Form of town clerk's notice of submission of local option—Resubmission refused where there were only possible slight defects in posting and publishing.

A town clerk's statutory public notice that the local option questions will be voted upon at the next town meeting need not state that all of the four questions will then be voted upon nor need they be set out in full.

The notice is sufficient where, under the heading "Local option to determine whether liquors shall be sold under the provisions of section 16, chapter 367, Laws of 1900, known as the Liquor Tax Law," it proceeds to state that a vote will be taken by ballot "upon said proposed questions" at the next town meeting.

The statute, in so far as it relates to notice, is merely directory and where it appeared that there might possibly have been slight errors in the posting and publishing of some of the notices, the court held a resubmission unnecessary and unjustifiable.

APPLICATION under section 16 of the Liquor Tax Law for an order directing a special town meeting to be called to vote upon the local option questions provided for in said section, on the ground that said questions were not properly submitted to the electors of said town at the regular town meeting held in March, 1901.

Thompson & Sons, for petitioners.

William G. Van Loon, for State Commissioner of Excise.

RAMSDALE, J.: This is an application under section 16 of the Liquor Tax Law for an order directing a special town meeting to be called to vote upon the local option questions provided for in said section 16 of the Liquor Tax Law, on the ground that said questions were not properly submitted to the electors of said town at the regular town meeting held in March of the present year.

The petition shows that the town clerk did, on or about March 1st, and more than ten days before the holding of the town meet-

ing, cause to be posted in more than four public places of the town a notice, the pertinent parts of which were as follows :

“NOTICE OF QUESTIONS TO BE SUBMITTED.

“LOCAL OPTION

“To determine whether liquors shall be sold under the provisions of Section 16, Chapter 367, Laws of 1900, known as the Liquor Tax Law.

“Now, therefore, notice is hereby given that a vote will be taken by ballot upon said proposed questions at the next biennial Town Meeting of said Town of Yates to be held on the 12th day of March, 1901.

“Dated YATES, *February* 25, 1901.

“LEIGH HILL,
“*Town Clerk.*”

That he caused said notice to be published in the *Medina Tribune*, a paper published in the county, on Thursday of the week commencing February 24, 1901.

That thereafter said town clerk caused said notice to be so changed as to read as follows :

“LOCAL OPTION

“To determine whether liquors shall be sold under the provisions of Section 16, Chapter 367, Laws of 1900, known as the Liquor Tax Law. Amended. Now, therefore,” etc.

That on the 2d and 4th days of March, 1901, the said town clerk caused said changed notice “to be posted in more than four public places in said town of Yates in place of the notice firstly hereinabove set forth”; but that there were not four of such changed notices posted until March fourth; that he also caused said changed notice to be published in the *Medina Tribune* on Thursday of the week commencing March third.

Section 16 of the Liquor Tax Law provides that, upon filing with the town clerk the proper request that the several propositions be voted upon at the town meeting, he shall, at least ten days before the holding of such town meeting, cause to be printed and posted in at least four public places of such town a notice of the fact that all of the local option questions provided for therein will be voted upon at such town meeting or general

election; and that said notice shall also be published at least five days before a vote is to be taken once in one newspaper published in the county in which such town is situated.

The contention of the petitioners is that the town clerk failed to perform the duty imposed upon him by said section, in that he did not, in his notice, say that *all* of the questions mentioned in section 16 would be submitted to the voters, and that he did not set forth all said questions at large in said notice. It is also claimed that he did not post four of said changed notices in said town at least ten days, and did not publish the same five days before the holding of the town meeting; that, on account of these alleged defects, the propositions were improperly submitted, and that a special town meeting should be called for the purpose of having said propositions properly submitted and voted upon.

There is no allegation in the petition or papers accompanying it that any elector was misled in any way by the action of the town clerk, nor is it alleged that a full vote was not cast upon the several propositions mentioned in section 16; but, on the contrary, it does appear, from the petition and the affidavit read in opposition to the motion, that on at least one of the propositions there was cast for and against 406 votes (including blank and void ballots), and that the whole number of votes cast for the office of supervisor at said town meeting was 409, and that more than a majority of 409 votes were cast against all of said propositions, except the third.

First. As to the sufficiency of the form of the notice.

The statute provides no specific form of notice to be given. The requirement is that the town clerk shall cause to be printed and published a "notice of the fact that all of the local option questions provided for herein (§ 16) will be voted on at such town meeting." I think the notice in this case complies with the requirement of the statute. It is headed "Local Option." It then goes on to say that it is to determine whether liquors shall be sold under the provisions of section 16 of the Liquor Tax Law, giving the chapter and year. It certainly was enough to put the elector on inquiry, and, by looking at the statute indicated, he could not help actually knowing what *all* the local option questions provided for in section 16 are, to say nothing of the legal presumption that every one knows the law.

By the notice as given, he is directed to a particular section of a general statute of the State (and which is accessible at all

times to him), where he can get actual knowledge of *all* the matters he is required to pass upon.

The object of the requirement of notice is, I take it, not so much to give, in exact words, the precise questions to be voted on (for the statute distinctly provides that all four of the questions enumerated in section 16 shall be submitted) as to give the information that the preliminary steps required by the statute have been taken—that the petition has been filed, etc.—and that the general question of local option is up for decision by the people.

The elector is presumed to know what the law is, and what particular questions he will have to vote upon when the general question is up, but he is not presumed to know the fact that the proper petition has been filed to allow the general question to come up. The notice in this case gives this information. There is nothing misleading about it, nor is it claimed that any one was misled by it. There is no intimation in the papers but that the will of the people was fairly expressed by the vote taken, but, on the other hand, the papers do show that there was a full and fair expression of the sentiment of the electors, and that such sentiment is the same as has existed in the town for years past.

In *People ex rel. Crane v. Chandler*, 41 App. Div. 178, the Appellate Division of this department decided that a notice that "The license question, as provided by the Raines law, will be submitted to the voters at this town meeting" was a good and sufficient notice. If that notice was good, then the one in this case certainly is.

But the point is made that that decision does not apply in this case, for the reason that the Liquor Tax Law did not, at that time, provide for any notice. The answer to this is that notice of the submission of all such propositions, in substantially the same form and manner as now provided for in section 16, was provided for in the Town Law, and that notice was as obligatory then as now. (*Matter of Eggleston*, 51 App. Div. 38.)

If too much particularity is required in carrying out the provisions of these statutes, then they will, in more instances than not, defeat themselves, and the will of the people, which is the controlling object to be safeguarded, will be subverted. The individuals to whom the Legislature has delegated the duty of performing these services are not, in the vast majority of cases, persons learned in the law, but are persons of ordinary education

and business ability, and this the Legislature knew. In giving judicial interpretation to the law, and the sufficiency of compliance with it, these facts ought to be taken into consideration, and where there is a substantial compliance with its provisions, and no fraud, concealment or deception is practiced, the acts of the officials should be upheld.

Second. As to the time within which the notices were published and posted.

The first or original notice was published and posted in ample time. Of this there is no dispute. The changed notice was published on the seventh of March, and the town meeting was on the twelfth. Some of the changed notices were posted on the second. These acts were both done in time. (*People v. Burgess*, 153 N. Y. 561.)

It does not appear, either, but that at least four of the original notices remained up, or were not "changed." In any event, I think the statute is directory as to the time of the notice, and that a new town meeting should not be called, with the annoyance and expense attendant thereon, for the slight error of the clerk, if, indeed, there was one.

In *People ex rel. Crane v. Chandler, supra*, a notice posted four days before the town meeting was held sufficient, and in *Matter of Rowley*, 34 Misc. Rep. 662, a proceeding under the very law here in question, Justice Rich held that *no* notice by the town clerk was necessary to the validity of the election, when it was shown that the electors had actual notice and a full vote was polled.

I think a fair expression of the choice of the electors of the town was had at the regular town meeting, and that no such error was committed by the town clerk or other officer as should vitiate it.

The motion for an order directing the calling of a special town meeting is, therefore, denied, but without costs.

Motion denied, without costs.

Court of General Sessions of the Peace in and for the County of New York, October, 1901. Reported 36 Misc. 135.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* FELIX CORNYN, Defendant.

Misdemeanor under Liquor Tax Law—New York city liquor store proprietors, charged as misdemeanants in the Special Sessions, are entitled to a trial by indictment and a jury—Barkeepers and employees are not so entitled—Laws of 1897, chap. 378, § 1406.

The severe penalties and consequent forfeitures attendant upon the conviction of a proprietor of a liquor store in the city of New York, charged in its Court of Special Sessions with a misdemeanor in having violated the Liquor Tax Law, make it "reasonable that the charge be proceeded with by indictment" (Laws of 1897, chap. 378, § 1406); and upon this ground a justice of the Court of General Sessions, by his certificate to that effect, ousted of jurisdiction the said Court of Special Sessions, which has no jury.

In cases involving barkeepers and employees, a certificate was refused upon the ground that the consequences following their conviction were not so severe and that therefore no unusual facts made it improper for them to be tried by the justices of the Special Sessions.

APPLICATION for a certificate that "it is reasonable that the charge herein be proceeded with by indictment."

O'Hare & Dinnean (Stephen J. O'Hare, of counsel), for motion.

Eugene A. Philbin, District Attorney (James Lindsay Gordon, of counsel), opposed.

FOSTER, J. This is an application for a certificate that "it is reasonable that the charge herein be proceeded with by indictment" (L. 1897, ch. 378, § 1406, Charter of the City of New York). No affidavit or facts in opposition to the application are presented, although due notice has been given to the district attorney. Other like applications are also before me, and this decision may also apply to them.

It appears, and without dispute or contradiction, that the defendant is the proprietor of a liquor store, and of the fittings and furnishings thereof, and the owner and holder of a liquor tax certificate, for which he paid the State \$800, and that the defendant is charged with a violation of the Excise Law. The

defendant, under the solemnity of an oath, declares his innocence of the charge and asks, by this application, for a trial by a jury of his peers. It seems to me entirely reasonable and right that he should have it, under the circumstances which he brings to my attention.

Where a felony is charged a defendant is entitled of right and of course to jury trial, because of, I take it, the possible severity of the punishment. Penal Code, § 5. Yet in most felonies no minimum punishment is fixed by law, and the punishment is left almost entirely to the discretion of the judge presiding, even to the entire suspension of the sentence. Our law, in its jealous and tender regard for the rights of the accused, thus assures a jury trial in cases of felony because and where serious consequences may follow a conviction, and this right is guaranteed by the Constitutions of this State and of the United States. In petty cases (misdemeanors) a defendant in this city and county may not as of right have a jury trial, but only when to a judge of this court or of the Supreme Court it appears "reasonable" that he should have it. Charter, § 1406, *supra*.

The constitutionality of the Court of Special Sessions, with its exclusive jurisdiction over misdemeanors, has been upheld by the court of last resort and will not be considered here. *People ex rel. Comaford v. Dutcher*, 83 N. Y. 240; *People ex rel. Murray v. Justices*, 74 id. 406. The subject of the transfer of actions from the Special Sessions, which has no jury, to a court of higher jurisdiction, which inquires with the aid of a jury, has often been before the courts. In one of the earliest cases (*People v. Levy*, 24 Misc. Rep. 469), Judge Beekman, with his recognized ability and clearness, defined the word "reasonable" (on a somewhat similar application) as "where there are exceptional features in the case which render it desirable and proper that the action should be tried before a jury rather than by a justice of the Special Sessions." And the learned judge further says: "Facts must be brought to the attention of the judge, to whom the application is made, tending to show that the case is of an exceptional character." This case precisely meets the rules or tests therein laid down. In *People v. Nethersole*, the learned Fursman, J., held that because, *inter alia*, large property rights and interests were involved it was reasonable and right that "the case should be investigated by men taken from various walks in life, such as constitute juries in our courts of record, and who

are, according to the theory of our law, best qualified to judge as to what inferences and conclusions ought to be drawn from a given state of facts." An examination of the applications wherein transfers have been refused and opinions rendered will disclose that no such convincing *facts* in support of the application were in them brought to the attention of the court as are shown here.

It may be observed, in passing, that throughout the State excepting only this city and county, a jury trial is granted to defendants even in these petty cases as of *right*. I have never been able to understand why an inhabitant of this imperial city should be denied what is accorded as a *right* to the humblest rustic. It may be further observed that a violation of the Excise Law is punishable more severely in this city than elsewhere in the State, because the "property right" involved is greater. Whatever we may think of the moral effect of the business of "selling spirituous liquors," the fact remains that, under our law, it is as legitimate as the baking of bread, and those engaged in it are the equals of any before the law. The Excise Law provides a punishment for its violation in this city more severe and drastic by far than is required for most felonies or is provided or permitted for any other misdemeanor. The maximum punishment for a misdemeanor is one year's imprisonment and a fine of \$500. For the "misdemeanor" charged herein the law provides a discretionary punishment of one year's imprisonment and a fine of \$500. And also an obligatory punishment of a forfeiture of license amounting to \$800, and possibly a penalty under the bond given for non-violation of \$1,600, and, in addition to all this, there is superimposed a reminder of the long ago abolished bill of attainder in that the defendant cannot again follow his usual vocation of selling liquor for a period of five years. Thus, though the Legislature calls such a violation a "misdemeanor," the punishment, which alone is the true test, stamps the crime as more than a misdemeanor.

To my mind, therefore, it is reasonable, if a defendant desires, that a trial before a jury of the defendant's peers should be had before these direful consequences can be visited upon him. Nor can the fact, if it be a fact, as has been suggested, that a jury will probably acquit a defendant charged with violating the Excise Law be urged with force as a reason for denying this application. If this law, or the punishment which is provided for its violation,

so offends the sense of justice of the community that juries will even violate their oaths to acquit, where the evidence of guilt is convincing, I can only regret it. To my mind it is not reasonable to refuse a jury trial for such reason. I am aware that the district attorney opposes this motion, but no facts whatever and no argument which I deem reasonable or valid is advanced in support of his contention.

I must, therefore, adhere to my former decisions and remove these cases wherein, as in this case, both important property rights are involved and a proprietor is charged with a violation of the Excise Law. The consequences which follow the conviction of an employee are by no means so severe, and in such applications now before me no unusual facts are brought to my attention which would justify me in granting their applications, and they will be accordingly denied.

Applications granted as to the proprietors, but denied as to the barkeepers and employees.

Submit certificates accordingly.

Ordered accordingly.

Fourth Appellate Department October, 1901. Reported. 64 App. Div. 623.

In the Matter of the Petition of GEORGE H. HARRIS to Remove from Office NELSON ROUNSEVELL, a Justice of the Peace of the Town of Cuba, N. Y.

REPORT of referee confirmed and respondent removed from his office as a justice of the peace. It is further ordered that the respondent pay to the treasurer of the County of Allegany the sum of \$319.62 to reimburse said county for the fees and expenses of the referee and stenographer in this proceeding, as allowed by this court. Application to remove a justice of the peace from office under the power conferred by section 132 of the Code of Criminal Procedure.

WILLIAMS, J. Upon charges made and an answer thereto, a reference was ordered to take proof of the facts and report, with opinion thereon. The referee has taken and reported the proofs,

with his opinion, and application is now made for a final disposition of the matter. The charges are three in number:

First. That respondent was a man of bad character (specifying acts of gross immorality).

Second. That while acting as a justice of the peace, and a member and the presiding officer of the election board, at a town meeting in his town, he violated the election laws of the State, by opening and examining ballots, presented by electors to him to be deposited in the ballot boxes and ascertained how the electors voted, and communicated such information to another person present, and that he had money for use, and used the same to corrupt voters at the same town meeting.

Third. That he committed an aggravated assault and battery upon a lawyer who had been a watcher at such town meeting.

The referee expresses the opinion that all these charges are sustained by the evidence, and states particularly what appears as to the extent of the respondent's wrongdoing. We have examined the evidence, and find that the opinion of the referee is fully justified thereby. The respondent did not present himself as a witness, did not contradict any of the evidence given against him, and not only the evidence as to his conduct, but as to his own statements with reference thereto stand unanswered by him. This being so, there can be no doubt as to our duty to remove him from office. He was guilty of acts of gross immorality, which we need not recite in detail, as our decision is not based thereon. At a town meeting in his town there was a contest on the question of license. The respondent was in favor of license, and had in his hands over \$100 contributed by persons interested in bringing out the license or liquor vote, and used some of it, at least, to induce persons to vote for license. He was, by virtue of his office, a justice of the peace, a member of the election board at that town meeting, and was made chairman of the board and took the ballots as they were presented by the electors, and deposited them in the ballot boxes. During the earlier part of the day he examined the ballots taken by him on the question of license, and found out how the electors voted, and signaled to one of his friends outside the board of information. This was a flagrant violation of the election laws of the State, providing for the secrecy of the ballot. It was objected to by a lawyer present, a Mr. Todd, and by others. The respondent said that he had a perfect right to examine the ballots to see how the votes were

cast; that the only thing the officer could not do was to open the ballots so as to see the inside or face, or communicate his knowledge to some one else; that no one could object to his knowing how a man voted; that the crime was in giving it away; that if he looked at the ballots and motioned to somebody indicating the way the vote was, that would not be any offense under the statute. A short time after this town meeting the respondent announced his intention of assaulting the lawyer Todd, who was a watcher at the town meeting, and who had objected to his examining the ballots of electors, and the next day after announcing such intentions he did commit such assault. He was himself a young man of twenty-three years of age, strong and well built, and Todd was a man over fifty years of age and a cripple. The attack was a cowardly one, respondent striking Todd in the back, without giving him any chance even to defend himself, and following up the attack by inflicting severe physical injuries upon Todd. He was arrested for this crime, was brought before another justice of the town, was convicted of the offense, fined twenty-five dollars and paid the fine. He was a peace officer of the town, and it was his duty to compel others to keep the peace, and still he committed this crime, this aggravated assault, himself, not from any sudden impulse or heat of passion aroused at the time, but deliberately, having announced his intention to do so the day before. The mere recitation of these established facts is sufficient to justify our determination to remove respondent from his office. The cowardly assault committed by this man upon his neighbor, a cripple, shocks not only our sense of justice, but of decency, while the deliberate and persistent violation of the Election Law while in the performance of his duty as presiding officer of the town election board, destroying the secrecy of the ballot which the Legislature has so carefully provided for and which the whole people are so much interested in preserving, was without excuse or palliation, and renders respondent entirely unfit to further hold this judicial office, where he can do so much harm. An order should be entered confirming the referee's report and removing the respondent from office. The order should further provide that the respondent pay the costs of this proceeding.

All concurred.

Fourth Appellate Department, October, 1901. Reported. 64 App. Div. 624.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. E. BRAYTON GUERNSEY, Appellants, v. HENRY B. PIERSON AND OTHERS, Respondents.

Order affirmed, with costs.

All concurred; RUMSEY, J., not sitting.

Court of Appeals. Reported. 168 N. Y. 258.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FRANK BREWERY, Appellant, v. PATRICK W. CULLINAN, as State Commissioner of Excise, et al., Respondents.

1. Liquor Tax Law—Right to rebate—Prosecution pending at time of surrender of certificate or within thirty days thereafter.

The conditions imposed by section 25 of the Liquor Tax Law (Laws of 1896, chap. 112) upon the attaching of the right to a rebate for the unexpired term of a liquor tax certificate are conditions precedent and the property right therein does not attach if there is an arrest or indictment or other prosecution provided for in the statute pending at the time of the surrender or within thirty days thereafter.

2. Prosecutions pending at time of issuance of certificate.

Prosecutions pending at the time of the issuance of the certificate and which are pending at the time of the surrender thereof, or within thirty days thereafter, apply with equal force and have the same effect upon the right to the rebate as violations committed after the certificate has been issued.

People ex rel. Frank Brewery v. Lyman, 58 App. Div. 625, affirmed.

(Argued October 1, 1901; decided October 11, 1901.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made March 8, 1901, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the state commissioner of excise to direct the payment of a rebate on a surrendered liquor tax certificate.

The facts, so far as material, are stated in the opinion.

Alfred R. Page for appellant. A conviction for selling without having obtained a liquor tax certificate does not work a forfeiture of a certificate afterward acquired, or of the right to rebate. (*Matter of Lyman*, 27 Misc. Rep. 327; 44 App. Div. 507.) The right to the rebate is a property right, of which the certificate holder can only be deprived by due process of law. (*Met. Bd. of Excise v. Barrie*, 34 N. Y. 657; *Niles v. Mathusa*, 20 App. Div. 483; 162 N. Y. 546; *People v. Durante*, 19 App. Div. 292; *Matter of Hilliard v. Giese*, 25 App. Div. 222; 155 N. Y. 702; *Matter of Jenney*, 19 Misc. Rep. 244; 19 App. Div. 627; *Matter of Lyman*, 160 N. Y. 100.) The state commissioner of excise is a ministerial and not a judicial officer, having no power to revoke a certificate or to declare forfeited any of the rights thereby secured. (*Matter of Hilliard v. Giese*, 25 App. Div. 222; *Matter of Lyman*, 27 Misc. Rep. 327.)

Royal R. Scott for respondents. No person is entitled to surrender for rebate a liquor tax certificate against whom a complaint, prosecution or action is pending on account of any violation of the Liquor Tax Law. (*Matter of Seitz*, 32 Misc. Rep. 108; *People ex rel. v. Lyman*, 59 App. Div. 172.) The second point in appellant's brief in the court below "that the right to the rebate is a property right of which the certificate holder can only be deprived by due process of law" is not tenable in this proceeding. (*Matter of Livingston*, 24 App. Div. 51; *People ex rel. v. Lyman*, 33 Misc. Rep. 243.) The relator, Frank Brewery, being only an equitable assignee, has no greater right than Anderman, and their right to rebate is subject to all the conditions, restrictions and penalties provided by the law. (*People ex rel. v. Lyman*, 156 N. Y. 407; 27 App. Div. 527; *People ex rel. v. Lyman*, 33 Misc. Rep. 243.)

HAIGHT, J. The facts are without substantial dispute. On the 25th day of April, 1899, the special deputy commissioner of excise of the boroughs of Manhattan and Bronx, upon the payment to him of the sum of \$800, issued a tax certificate to Herman Anderman, permitting him to traffic in liquors at premises, 208 Henry street in the borough of Manhattan. Anderman thereupon, by an instrument in writing, assigned and transferred to the Frank Brewery all his right, title and interest in and to the rebate for the unearned portion of the liquor tax certificate, and authorized

and appointed the brewing company as his agent to surrender the certificate at its option at any time and to take such proceedings to recover the rebate as may be required. Thereafter, and on the first day of June, 1899, the brewing company, as such agent, surrendered the certificate to the special deputy commissioner of excise, accompanied by a petition praying that the rebate for the unexpired term of the tax certificate be paid over to the assignee.

It further appears that on the 22d day of April, 1899, three days before the issuing of the liquor tax certificate to Anderman, he was charged with the selling of spirituous liquors to be drunk upon his premises in violation of the Excise Law and that he was arrested and bound over by the magistrate to await the action of the grand jury; that on the first day of August thereafter he was indicted and that he was subsequently brought to trial and convicted upon his own plea of guilty and fined the sum of \$800. The state commissioner of excise refused to pay the rebate because of such arrest, indictment and conviction of Anderman.

The appellant contends that under section 34 of the Liquor Tax Law the selling of liquor without a liquor tax certificate is made a misdemeanor punishable by a fine and that no forfeiture of the liquor tax certificate thereafter procured or of the rebate thereon is prescribed by the statute; that the rebate provided for is a property right which vested in the Frank Brewery and that it could not be deprived of such right except by due process of law. It is true that subdivision one of section 34 of the Liquor Tax Law prescribes a punishment by fine and does not provide for a forfeiture of the liquor tax certificate or of the rebate, but the provisions of section 25 of the law providing for a rebate impose certain conditions to the attaching of a right to the rebate. So much of the provision of that section as is material upon this review is as follows: "If a corporation, association, copartnership or person holding a liquor tax certificate and authorized to sell liquors under the provisions of this act, against which or whom no complaint, prosecution or action is pending on account of any violation thereof, shall voluntarily, and before arrest or indictment for a violation of the liquor tax law, cease to traffic in liquors during the term for which the tax is paid under such certificate, such corporation, association, copartnership or person or their duly authorized attorney may surrender such tax cer-

tificate to the officer who issued the same, * * *. If within thirty days from the date of the receipt of such certificate by the state commissioner of excise, the person surrendering such certificate shall be arrested or indicted for a violation of the liquor tax law, or proceedings shall be instituted for the cancellation of such certificate, or an action shall be commenced against him for penalties, such petition shall not be granted until the final determination of such proceedings or action; and if the said petitioner be convicted, or said action or proceedings be determined against him, said certificate shall be canceled and all rebate thereon shall be forfeited; but if such petitioner be acquitted, and such proceedings or action against him be dismissed on the merits, then the state commissioner of excise shall prepare two orders for the payment of such rebate," etc. (L. 1897, ch. 312.) Upon a careful consideration of the provisions of this statute it is apparent that the conditions imposed are conditions precedent and that the property right in the rebate does not attach if there is an arrest or indictment or other prosecution provided for in the statute pending at the time of the surrender or within thirty days thereafter. In this case Anderman was under arrest charged with a violation of the Excise Law at the time that his certificate was surrendered and consequently was not in a position in which he could make a surrender and become entitled to the rebate.

It appears that the violation of the Excise Law charged in this case occurred before the liquor tax certificate was issued to Anderman. It is now claimed that the arrest and prosecution referred to in section 25 of the statute has reference to violations of the law or penalties accruing during the life of the tax certificate and not to offenses committed before the certificate was issued. By referring to section 23 of the act we find that a person convicted of a violation of the act shall not be eligible to traffic in liquors until after the expiration of three years from the date of his conviction. The wording of section 25 is exceedingly broad, containing no limitation to the lifetime of the certificate. We, therefore, are of the opinion that prosecutions pending at the time of the issuance of the certificate and which are pending at the time of the surrender of the certificate or within thirty days thereafter apply with equal force and have the same effect upon the right to the rebate as violations committed after the certificate has been issued. The Frank Brewery, being the assignee and acting as agent of Anderman, stands in his shoes

and has no greater rights to the rebate than he would have had had he surrendered the certificate in person.

The order appealed from should be affirmed, with costs.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, VANN and LANDON, JJ., concur.

Order affirmed.

Court of Appeals. Reported. 168 N. Y. 645.

In the Matter of the Application of ELIZA MOULTON, Appellant, to Revoke and Cancel Liquor Tax Certificate No. 18,052, Issued to PASQUALE ACCONCIA, Respondent.

Matter of Moulton, 59 App. Div. 25, affirmed.

(Argued October 3, 1901; decided October 22, 1901.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made March 8, 1901, which reversed an order of Special Term revoking and canceling liquor tax certificate No. 18,052 and dismissed the proceedings.

Lincoln G. Backus and *Henry L. Maxson* for appellant.

Alfred R. Page for respondent.

Order affirmed, with costs, on opinion below.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

Supreme Court, Erie Special Term, November, 1901. Unreported.

In the Matter of ALICE MYERS against the Town Canvassers of the Town of Wales.

MOTION by Myers for mandamus to compel the board of canvassers of the town of Wales, in the county of Erie to reconvene and recanvass the votes cast upon the questions of local option in

said town on the 12th day of March, 1901, and directing said board to reject all votes cast upon the question of local option at said town meeting, and directing the cancellation of the certificate filed with the deputy excise commissioner in the city of Buffalo, etc.

C. H. Addington, attorney for petitioner.

William E. Schenck, attorney for the State Commissioner of Excise.

CHILDS, J.: The petitioner seems to have mistaken the remedy. The question of local option not having been properly submitted to the electors of the town at the town meeting held in March, the remedy for such failure is confined to the resubmission thereof at a special town meeting, called in accordance with the provisions of the statute. The precise question on this motion has recently been determined in the Appellate Division of this department in the matter of the application of John B. O'Hara for a writ of mandamus, reported, 63 App. Div. Reports 512, which is conclusive upon this court. The motion must, therefore, be denied, but as there is some controversy in the case, which may have misled the petitioner, without costs.

Supreme Court, New York Special Term. Reported. N. Y. L. J.
November 29, 1901.

PATRICK W. CULLINAN *v.* FRANK HERMANN, et al.

MOTION by the plaintiff to strike out of the answer of the defendant, Frank Hermann, the words, in folio 2: "He repeats the foregoing allegations," on the ground that the said matter is redundant; and the words in folios 2 and 3 thereof, "And for a further and separate defense against the cause of action set forth in the complaint alleges as follows: II. That upon the trial of an indictment in the Court of General Sessions in and for the county of New York, which is a court of record, it was adjudged upon the verdict of a jury that the defendant was not guilty of and did not commit the acts and omissions stated in the complaint herein,

and that no appeal was taken from said judgment, and the time within which an appeal could be taken has expired," on the ground that the matter therein contained is irrelevant, immaterial and impertinent.

Herbert H. Kellogg, for plaintiff.

J. Mulholland, for defendant Hermann.

Boardman, Platt & Soley, for defendant, United States Fidelity and Guaranty Company.

CLARKE, J.: A plea of *autre fois* acquit would be good in a criminal case. But this is a civil action, with a different rule as to proof. Here, preponderance; in the criminal court, beyond a reasonable doubt. The parties are different. The People, in one case, asking for fine and imprisonment, based upon conviction of a crime. Here, the commissioner suing on a bond against principal and surety on money judgment on a contract.

The motion is granted, \$10 costs to abide event.

First Appellate Department, November Term, 1901. Reported.
65 App. Div. 27.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, *v.* THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant, Impleaded with MARGARET A. OUSSANI.

Principal and surety—Where they answer separately each is entitled to open and sum up the case by his own counsel.

Where the State Commissioner of Excise brings an action against the principal and surety upon an excise bond for a violation of the Liquor Tax Law by the principal, and the principal and surety answer separately, raising somewhat different issues, and appear upon the trial by separate attorneys, the court has no right, without the consent of the surety, to require the latter to acquiesce in the opening and summing up of the counsel for the principal, and to deprive it of the right to present, through its own counsel, its views of the evidence and the questions upon which the jury is to pass.

APPEAL by the defendant, The Fidelity and Casualty Company of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of January, 1901, upon the verdict of a jury, and also from an order entered in said clerk's office on the 28th day of December, 1900, denying the defendant's motion for a new trial made upon the minutes.

Charles C. Nadal, for the appellant.

Royal R. Scott, for the respondent.

PER CURIAM. This action was brought against the principal and surety upon an excise bond to recover the penalty thereof, to wit, the sum of \$1,600 for a violation of the Liquor Tax Law (Laws of 1896, chap. 112, as amd.) by the principal. The principal and surety answered separately, and the issues raised by the answers were somewhat different. Upon the trial they appeared by separate counsel. At the close of the plaintiff's case a separate motion was made in behalf of each defendant to dismiss the complaint, and in many respects upon different grounds. The court decided to submit but two questions of fact to the jury, viz., whether liquor was sold on the premises after one o'clock on the nights of February 22 and 27, 1900. Counsel for the principal then opened the case to the jury for his client, at the close of which counsel for the surety company demanded the right to open the case in behalf of his client and to state to the jury his client's position with reference to the evidence. The court refused to permit such opening and appellant's counsel excepted. At the close of all the evidence the principal's counsel summed up for his client, and the counsel for the surety company asserted his right to also sum up in behalf of appellant. This was objected to by plaintiff's counsel. The objection was sustained by the court and appellant's counsel excepted.

The liability of the defendants was several and was not necessarily the same. We think the court had no right, without appellant's consent, to require it to acquiesce in the opening and summing up by the counsel for the principal and to deprive it of the right and privilege of presenting through its counsel its own views of the conflicting evidence and questions upon which the jury was to pass. Where such a case is being defended in

good faith, an arrangement can ordinarily be made at the suggestion of the court, by which one counsel will discuss the question of fact for all of a class of defendants that may be affected alike; and the court has it in its power, by limiting time of counsel in addressing the jury, to prevent the time of the court and the jury being unnecessarily occupied; but we cannot assent to the doctrine that the court may say arbitrarily that the attorney or counsel for a principal shall open and sum up the case, not only for his own client, but for the surety whom he does not represent.

No other question in the case calls for serious consideration, but these exceptions require that the judgment and order should be reversed as to appellant and a new trial granted, with costs to appellant to abide the event.

Present — VAN BRUNT, P. J., PATTERSON, INGRAHAM, McLAUGHLIN and LAUGHLIN, JJ.

Judgment and order reversed as to appellant and new trial granted, with costs to appellant to abide event.

First Appellate Department, November Term, 1901. Reported.
65 App. Div. 202.

PATRICK W. CULLINAN, as State Commissioner of Excise of the State of New York, Appellant *v.* THE TROLLEY CLUB and Others Respondents.

Evidence of agents of the State Excise Department is not subject to the same scrutiny as that of private detectives—What proof is required to enable one to take advantage of the exception in the case of a club—By what act is the privilege lost.

Special agents of the State Excise Department, who are charged with the duty of investigating violations of the Liquor Tax Law and of generally supervising persons engaged in the liquor traffic, are not hired to obtain evidence, nor are they in any sense detectives, and testimony given by them on the trial of an action brought by the State Commissioner of Excise to recover the penalty of a liquor tax bond, because of the sale by the principal in the bond of liquor to such special agents on Sunday, is not subject to the same scrutiny as the evidence of a private detective hired at the instance and for the benefit of private persons.

On the trial of such an action the plaintiff is entitled to have the court charge that in order to enable the defendants to take advantage of the exception contained in the Liquor Tax Law in favor of clubs, it was necessary for them to plead and prove all the elements bringing the principal in the bond within such exception, and also that if the principal had ever acquired the privileges of a club, it lost them if it sold liquors to persons who were not members of the club.

APPEAL by the plaintiff, Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 4th day of March, 1901, upon the verdict of a jury, and also from an order entered in said clerk's office on the 1st day of March, 1901, denying the plaintiff's motion for a new trial made upon the minutes.

Herbert H. Kellogg, for the appellant.

Alfred R. Page, for the respondents.

HATCH, J.: This action was brought to recover the penalty of a liquor tax bond given by the defendant the Trolley Club, as principal, and the defendants Walz and Marcus, as sureties, upon the Trolley Club's application for a liquor tax certificate to traffic in liquors under subdivision 1 of section 11 of the Liquor Tax Law (chap. 29. of the General Laws [Laws of 1896, chap. 112, as amended]).

It is averred in the complaint that the Trolley Club violated the Liquor Tax Law by sales of liquor to special agents of the Excise Department on February 3, 1900, between the hours of one and five o'clock a. m., and on Sunday, February 4, 1900.

The evidence given to support the averments of the complaint is found mainly in the testimony of three special agents appointed by the State Commissioner of Excise, pursuant to the provisions of section 10 of the Liquor Tax Law. These agents visited the place of business of the defendant club on Saturday, the 3d day of February, 1900, and their testimony is to the effect that they arrived at the place shortly after midnight and remained until about two o'clock Sunday morning. On entering the place these witnesses passed through the room where the bar was situated into a rear room, separated from the bar by a partition; in the latter room tables were placed around the sides and seated thereat were men and women, the center of the room being clear of tables

or other obstructions. Each of these witnesses, during the time they were in the place, ordered and were served with whisky, for which they paid the waiter, who received the orders and delivered the drinks. From time to time the center of the room was cleared and used for dancing by some of the occupants of the room. The music was furnished by players upon a piano and violin, located at the rear end, and from time to time two or three men sang songs to a piano accompaniment. When these witnesses left the room the bar room door was locked and they were compelled to leave by a side entrance, which was open, and had so remained during the time they were there, and during this time men and women were constantly passing out and coming in by means of this entrance. There was no sufficient evidence given upon the part of the defendant from which it could be found that the defendant was a *bona fide* club, and as such entitled to sell liquor on Sunday. The witnesses for the plaintiff were not members of this club, nor had they ever heard of it, and the waiters and other employees about the concern sold to whoever came and ordered liquor. It is perfectly evident from the proof that the club existed only as a name, and in no respect did it answer to the requirements prescribed for a *bona fide* organization of that character. On the contrary, it is quite evident that it possessed all the characteristics of a dance hall, and was a place of resort for women of loose morals.

If the witnesses upon the part of the plaintiff were entitled to belief, it is clear that the plaintiff established a cause of action and was entitled to a judgment pursuant to the terms of the bond. In submitting the case to the jury the learned judge charged: "The evidence submitted on behalf of the State is by persons hired to obtain evidence. That is their business. The evidence of persons whose occupation it is to obtain evidence is always subject at least to scrutiny on the part of the gentlemen of the jury, who are called upon to say whether they believe them or not." To this charge an exception was taken by the plaintiff, and the court was requested to charge that "under the Excise Law of the State the excise agents draw a regular salary and have no financial interest whatever in the outcome of this case whatever the verdict might be." The court charged, in answer to this request, "That, under the Excise Law of the State, the excise agents draw a regular salary." The plaintiff excepted to the refusal to charge as requested.

We are of the opinion that the charge first above quoted was error, and that it was also error for the court to refuse to charge as requested. These witnesses were officers of the State, charged with the duty of investigating violations of the Excise Law, and of generally supervising persons engaged in the liquor traffic under a liquor tax certificate granted pursuant to law, and were subject to certain penalties for failure to properly perform their duty. (Liquor Tax Law, §§ 10, 38.)

They were in no sense hired to obtain evidence, nor does such duty devolve upon them, nor are they in any sense detectives, to which class of witnesses the language of the charge would have been applicable. There is a marked distinction between a public officer, charged with the duty of seeing that the laws are enforced and vested with power and authority to investigate violations of the law, and a private detective, hired to procure evidence of the violation of law at the instance and for the benefit of private persons. (*People ex rel. Simermeyer v. Roosevelt*, 2 App. Div. 498.) The charge of the court applied the rule applicable to the latter class of persons to these officers; such application was erroneous and clearly prejudicial. Undoubtedly the credibility of these witnesses was a question for the jury in like manner as other witnesses, but they were not subject to the scrutiny which attaches to the testimony given by private detectives.

The plaintiff was entitled, under its request, to a charge showing the relation of these officers to the case. Indeed upon such subject he was entitled to a much more full and complete charge as to the status of these officers and the rule to be applied in weighing their testimony than the request contained.

The court also charged, "The evidence offered by the defendant is of persons who say that the place was never opened after one o'clock on any day, and never on Sunday, because it closed at twelve o'clock Saturday night. You will go over all the evidence, which really goes to a very narrow issue, and determine which of the two sets of witnesses you credit." To this charge the plaintiff excepted. The charge itself was clearly erroneous as matter of fact, as the barkeeper of the defendant club testified that the club ran on Sunday nights; that he reached there at one o'clock Sunday afternoon; that he had the same hours on Sunday as any other day, and that he used to sell drinks to anybody who wanted to buy them, and Barron, a waiter, testified that he served liquor on Sundays as well as other days; that

there was no difference between Sundays and other days in this respect, except that on Sunday people came through the side entrance. In view of this testimony the charge of the court would seem to have been prejudicial to the plaintiff.

The case also presents another difficulty. In the main charge the jury were instructed that they were only to determine a single question of fact, *i. e.*, were sales of liquor made after one o'clock on Sunday, February fourth? After the jury had retired they communicated with the court and requested to be informed (1) if the defendant is licensed as a club? (2) did one of the inspectors testify that the license was seen by him in the place at about the time referred to? and (3) was the license in force at the time? The jurors were brought back and the court answered the first question, no; and followed this by a statement that licenses were not given to clubs as such, but to corporations and associations formed for social and recreative or similar purposes, and that such associations might "be excepted from the prohibition as to the traffic in liquor at certain times, if that be merely a distribution of liquor to members of the club or to other persons on behalf of members." To the second question the court stated that he thought the inspector testified that he saw the license in the place on February 9th, and, lastly, that the license was in force at the time, as it had not been revoked. To the charge of the court under the first question plaintiff's counsel took an exception to everything, except to the answer "no." The court asked how counsel would like to have it stated, and counsel requested the court to charge that there was no proof that the defendant, the Trolley Club, was organized and in existence as a club within the meaning of section 31 of the Liquor Tax Law at the times in question, and that there was proof that it was not a club, as the special agents were not members, and the general public was admitted to the place. The court declined so to charge, to which an exception was taken. The court then directed, "Strike out all of the first answer after the word 'no,'" and then proceeded to charge "that clubs are not licensed as such, but that duly incorporated associations, the objects of which are social and recreative and objects of similar character, are excepted from the prohibition as to the traffic in liquors on Sunday under certain circumstances, in so far as the distribution of liquor is to members of the club, or by members of the club, and only when the distribu-

tion of liquor is to or by or for members of the club or corporations."

Counsel for the plaintiff then stated, "I add to that that the witnesses in behalf of the plaintiff were not members of the Trolley Club." The court charged: "I will leave the evidence in the case to the recollection of the gentlemen of the jury. I am willing to say that they stated that they were not." Plaintiff's counsel again took an exception to the charge upon this subject, except as to the answer, no. At this point the foreman of the jury intervened, and said: "That the minds of some of the jurors may not be befogged by the law point that has been raised here, may I take the liberty of asking a further question? 'Did the testimony show that the license was granted on the application of Mr. Quigley, the president of the Club?'" Plaintiff's counsel replied: "It does." The foreman then asked: "To whom was the license issued?" To which the court replied: "The application was in the name of the Trolley Club." The foreman of the jury then announced that the jury had agreed upon their verdict. After some further colloquy the plaintiff's counsel asked the court to charge "That there is no evidence that the defendant, the principal, was organized and existed as a club at the times in question, February 3d and 4th, 1900, and that it was upon the defendant in order to entitle them to the privilege accorded to clubs to both plead and prove that they had in every respect complied with the statute organizing social clubs and that the defendant did not offer any such proof."

The court declined to charge the request as stated. Plaintiff's counsel: "Will your Honor charge that, in order to have had the benefit of the exception in favor of clubs it was incumbent on the defendant to show that it was organized in good faith under chapter 559 of the Laws of 1895, or under any law which, prior to May 6, 1895, provided for the organization of societies or clubs for social, recreative or similar purposes, and it was also incumbent upon the defendant, the principal, to prove that the defendant's certificate of incorporation was duly filed prior to March 23, 1896; and that at that date it trafficked or distributed liquor among the members thereof?" The Court: "It was incumbent upon the defendant to show, unless otherwise shown in the case—change it in that way and I will charge it." Plaintiff's counsel: "Also that if the defendant had ever had the privileges of a club it lost them if it sold liquors to persons who were not

members of that club, as has been testified to by the witnesses for the plaintiff in this case. Declined; plaintiff excepts." The jury thereupon rendered a verdict in favor of the defendant, without leaving their seats.

As before observed, the main body of the charge simply submitted the question as to whether or not sales were made on Sunday, February fourth, as claimed by the plaintiff. Not a word was said upon the subject of the defendant's being a *bona fide* club, and as such entitled to the protection of the exception contained in section 31 of the Liquor Tax Law. It was injected into the case by the inquiry which came from the jury; and in the charge of the court and the colloquy which ensued between court, counsel and jury in answer to these questions, it is evident that the question, at least so far as the jury was concerned, submitted in the body of the charge, was quite lost sight of and the jury were permitted to determine the issues upon the consideration as to whether or not the defendant was a *bona fide* club. The defendant pleaded that it was such, but the proof given upon the trial demonstrated that it was a mere dance hall, and, therefore, entitled to no benefit as a club. The requests to charge upon this subject, made by counsel for the plaintiff, were entirely proper and should have been granted, and the jury should have been instructed that there was no evidence upon which they could found a verdict exempting the defendants from liability based upon the defendant being a *bona fide* club. It is quite evident from the charge that the jury may well have thought that if the defendant took out a license as a club it had the right to make the sales which it did make. The submission of this question to the jury, therefore, was erroneous.

It follows from these views that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

First Appellate Department, November, 1901. Reported. 65 App. Div. 614.

HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Respondent, against DOBIE R. HARLEY and the United States Fidelity and Guaranty Company, Appellants.

Louis Marshall for appellant.

The obligee having contrived to bring about a breach of the condition of the bond, such breach cannot be made a ground of forfeiture against the surety. (*Lyman v. Gramercy Club*, 28 App. Div. 35; *Lyman v. Broadway Garden Hotel Co.*, 33 App. Div. 130; *Lyman v. Shenandoah Social Club*, 39 App. Div. 459; *Lyman v. Schermerhorn*, 53 App. Div. 32; *Mayor v. Dickerson*, 45 N. J. 38; *Newark v. Stout*, 52 N. J. Law, 35; *Watts v. Shuttleworth*, 5 H. & N. 246; *Black v. Ottoman Bank*, 15 More P. C. 472; *Madden v. Mullen*, 13 Ir. C. L. R. 305; *Riggs v. Palmer*, 115 N. Y. 506; *Ford v. City of Denver*, 51 Pac. Rep. 1015; *People v. Draisted*, 58 Pac. Rep. 796; *Walton v. Canon City*, 59 Pac. Rep. 840.) The court erred in denying defendant's request to go to the jury on the question of the credibility of the testimony of the special agents. (*Moller v. Moller*, 115 N. Y. 466; *Berry v. People*, 13 Albany L. J. 336; *Commonwealth v. Downing*, 4 Gray, 29; *Elwood v. West. Un. Tel. Co.*, 45 N. Y. 553; *Kochler v. Adler*, 78 N. Y. 291; *Wohlfahrt v. Beckert*, 92 N. Y. 497; *Goldsmith v. Caverly*, 75 Hun. 48; *Canajoharie Bank v. Diefendorf*, 123 N. Y. 191; *Matter of Seagrist*, 1 App. Div. 617, *affd.* 153 N. Y. 682.)

William Vanamee, for respondent.

The action of the special agents was entirely proper and was necessary in making the investigations required by law. (*Lyman v. Oussani*, 33 Misc. 409, reversed on other grounds.)

There was no error in directing a verdict upon their uncontradicted evidence. (*Cullinan v. Trolley Club*, 65 App. Div. 202; *Hemmens v. Wilson*, 138 N. Y. 517; *Leinkauf v. Lombard*, 137 N. Y. 417.)

The plaintiff, as State Commissioner of Excise, was not estopped from bringing suit on behalf of the people, the obligee, under this bond merely because he directed his confidential special agents to investigate the place for which the bond was

given and obtain evidence of any violation of the law there, as by buying liquors unlawfully for sale.

Order modified by striking out interest, and as modified affirmed, without costs to either party. No opinion.

Third Appellate Department, November, 1901. Reported. 66 App. Div. 615.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. FREDERICK NARROW, Respondent, v. WILLIAM J. MEIN and Others, Constituting the Town Board and Board of Canvassers of the Town of Norfolk, St. Lawrence County, New York, Appellants.

APPEAL from an order and judgment entered in the St. Lawrence county clerk's office on the 20th day of July, 1901, directing the issuance of a mandamus to the defendants, requiring them to convene and recanvass and declare void certain ballots voted at a town meeting. At a town meeting held in the town of Norfolk, St. Lawrence county, February 12, 1901, votes were taken upon the four local option propositions under the Liquor Tax Law. These votes were canvassed by the board of canvassers and the result declared. The application made was for a writ of mandamus to compel the said board of canvassers to reconvene, to recanvass the votes cast upon said propositions and declare said votes illegal and void, and to file a certificate with the county treasurer of said county to the effect that no election was had in said town on said propositions, for the reason that the town clerk of said town did not print or publish or cause to be printed or published in a newspaper the notice or any notice required to be published by him in accordance with section 16 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1900, chap. 367.) The special term ordered the issuance of the writ, and from said order and judgment entered thereupon this appeal is taken.

Per CURIAM: The questions upon this appeal seem to have been decided adversely to the respondent's contention in *Matter of O'Hara* (63 App. Div. 512.) With the reasoning of the learned

justices in that decision we entirely agree. The order and judgments appealed from should, therefore, be reversed, with costs and disbursements, and the motion denied, with ten dollars costs.

Present: PARKER, P. J., SMITH, KELLOGG, EDWARDS and CHASE, JJ. All concurred.

Judgment and order reversed, with ten dollars costs and disbursements, and application denied, with ten dollars costs.

Court of Appeals. Reported. 168 N. Y. 669.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE JOSEPH FALLERT BREWING COMPANY, LIMITED, Respondent, v. HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Appellant.

People ex rel. Fallert Brewing Co. v. Lyman, 53 App. Div. 470, affirmed. (Submitted November 11, 1901; decided November 22, 1901.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, made July 17, 1900, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus commanding the defendant to direct the payment of a rebate upon a certain liquor tax certificate surrendered for cancellation by the relator.

S. B. Mead and *W. E. Schenck* for appellant.

Louis Marshall and *Moses Weinman* for respondent.

Order affirmed, with costs; no opinion.

Concur: PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN and LANDON, JJ.

Supreme Court, Onondaga Special Term, December, 1901. Unreported.

PEOPLE ex rel. THEODORE O. HICKOK v. IRVING COONLEY as County Treasurer.

Wilson, Cobb & Ryan, for relator.

White & Bond, for Irving Coonley.

Albert O. Briggs, for State Commissioner of Excise. (*William E. Schenck*, of counsel.)

ANDREWS, J. The certificate must be issued by the county treasurer. He has no discretion when the proper papers are presented to him. If it shall be found that the consents of landlords or property owners have been duly revoked the certificate can therefore be cancelled.

Second Appellate Department, December, 1901. Reported. 67 App. Div. 623.

PATRICK W. CULLINAN, as State Commissioner of Excise, Respondent, v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellant, Impleaded with WILLIAM TEXTER.

Boardman, Platt & Soley, for appellant, Fidelity & Deposit Company.

There was no breach of the condition of the bond, as the violation occurred *at another place* than that mentioned in the bond. (*Lord Arlington v. Merricke*, 2 Saunders, 411; *Liverpool Water-Works v. Atkinson*, 6 East., 507; *The Kingston Mutual Ins. Co. v. Clark*, 33 Barb. 196; *The Grand Lodge v. Freifield, &c.*, 20 Misc. 276.)

Hirsh & Rasquin, for appellant Texter.

This law, being highly penal, must be strictly construed (*Whittaker v. Masterson*, 106 N. Y. 277; *Bonnell v. Griswold*, 80 N. Y.

128; *Ulster County Savings Institution v. Young*, 161 N. Y. 23; *Same v. Ostrander*, 163 N. Y. 430; *National Mechanics' Banking Assn. v. Conkling*, 90 N. Y. 116; *Lyman v. Kurtz*, 166 N. Y. 274; *Bissell v. Saxton*, 66 N. Y. 55; *Schofield v. Churchill*, 72 N. Y. 565.)

William E. Schenck, for respondent.

The court rightly directed a verdict for the plaintiff, as it was uncontradicted that the principal personally violated the provisions of the Liquor Tax Law, "while the business for which such tax certificate" issued upon the filing of the bond in suit was being carried on, although such violation occurred elsewhere. (*Lyman v. Perlmutter*, 166 N. Y. 410; *Lyman v. Schenck*, 37 App. Div. 234; *Lyman v. Shenandoah Social Club*, 39 App. Div. 459; *Matter of Lyman v. Texter*, 32 Misc. 210, affd. 59 App. Div. 217; *Matter of Michell*, 41 App. Div. 271.)

Judgment affirmed, with costs; no opinion.

GOODRICH, P. J., BARTLETT, WOODWARD, HIRSCHBERG and SEWELL, JJ., concurred.

Supreme Court, Queens Special Term, January, 1902. Unreported.

In the Matter of the Petition of PATRICK W. CULLINAN to Revoke the Liquor Tax Certificate of ARDELL HARTMANN.

William G. Van Loon, for petitioner.

Blumenthal, Moss & Feiner, for respondent.

MADDOX, J.: There is not enough to show an intentional and wilful violation of the law, especially when that involves a civil and a criminal penalty.

There is proof that a steak was ordered, and while petitioner's witnesses testified that they did not order it, and that nothing was served, still they do not state that such order was not given,

simply that they did not hear such an order. It seems the steak was prepared, and when to be served it was found that the party had left. I do not wish to be understood as holding that it was for the excise officers, but the order might have been and was so given as to lead respondent's manager to believe that it was.

I do not understand that no liquors shall be served to a guest until the meal is served, if one be ordered.

Application denied.

County Court, Monroe County, January, 1902. Unreported.

PEOPLE ex rel. PETER WARD *v.* THOMAS W. FORD, as Sheriff.

PEOPLE ex rel. WILLIAM PFARRER *v.* THOMAS W. FORD as Sheriff.

Hubert B. Hallock, for relators.

Robert Averill, assistant district attorney for the people.

SUTHERLAND, J.: The return discloses that the relator is held in custody by the sheriff of Monroe county, having been surrendered to the sheriff by his bondsmen, who had signed the undertaking required by Justice of the Peace HANFORD BASS, of the town of Parma, when the relator was held by said justice of the peace to await the action of the grand jury on the charge of selling intoxicating liquors without a liquor tax certificate in the town of Parma. The relator attacks the jurisdiction of the justice to hold him for the grand jury. When the relator was arrested and brought before the justice for examination, he moved for his discharge upon the ground that the justice had no jurisdiction to issue the warrant for his arrest, and the authority of the justice to conduct the examination is the question here.

Before a warrant was issued for the relator in the first instance, a written information, dated December 14, 1901, was verified by one James Swart before said justice, in which it is alleged: "Upon information and belief that on or about the 15th day of October, 1901, at the town of Parma, in said county of Monroe, Peter Ward, of said town of Parma, county of Monroe, did commit crime of misdemeanor in that he did at the time and place above

named unlawfully, wilfully and knowingly violate the Liquor Tax Law of the State of New York by selling lager beer to Henry Hines in violation of the terms of section 16 of the Liquor Tax Law. He, therefore, prays that subpoenas be issued for Henry Hines and Henry Bufton, and their depositions taken, and that upon all the evidence adduced, a warrant be issued and the said Peter Ward be apprehended to answer to said complaint, and be dealt with according to law."

This information does not state that the relator did not hold a liquor tax certificate when the sale was made, nor does it state that Parma was a no-license town at said time. Consequently no criminal act is charged, and the allegations of the information were not sufficient to give the justice authority to compel the attendance of witnesses. (*People ex rel. Laid v. Hannan*, 92 Hun, 476; *People v. Bates*, 61 App. Div. 559; *People v. Olmstead*, 74 Hun, 323.)

But after the information was filed, the justice issued subpoenas for the witnesses Hines and Bufton, who responded thereto without objection and were duly sworn by the justice and their depositions reduced to writing and properly subscribed. In his deposition Hines states that in the month of October, 1901, at the Appetite Springs Hotel, in the Town of Parma, he purchased of the relator a glass of lager beer, which, relator drew and delivered to Hines, who immediately drank it and paid relator therefor. The witness Bufton testified that he was town clerk of Parma and had been since 1893, and gave the vote on the license question in Parma at the town election held November 5, 1901, and at the last previous town meeting at which the people voted on the question, March 7, 1899, and from this vote it appears that relator could not have held a liquor tax certificate in October, 1901.

The information filed by Swart was insufficient to issue a warrant upon, but the depositions of Hines and Bufton supplemented the affidavit of Swart and completed the legal proofs necessary to invest the justice with jurisdiction to issue the warrant for the arrest of the relator.

I cannot see how the jurisdiction of the justice to finally issue a warrant is affected by the fact that the witnesses, Hines and Bufton, could not have been compelled to make the depositions on which the warrant issued, had they chosen to resist the subpoena. If they had accompanied Swart voluntarily to the jus-

tice's office and made these depositions, the warrant issued thereon would surely have been regular; and I cannot see that their failure to exercise their right to refuse to respond to the subpoena renders their depositions nugatory.

The justice had acquired jurisdiction when the warrant was issued, and the subsequent proceedings being regular, the motion to discharge the relator is denied.

Supreme Court, Kings Special Term, January, 1902. Unreported.

In the Matter of the Petition of PATRICK W. CULLINAN to Revoke the Liquor Tax Certificate of CHARLES E. SMITH.

H. H. Kellogg, for petitioner.

O. F. Finnerty, for respondent.

MADDOX, J. The petitioner's contention that respondent's answers to questions Nos. 3 and 5 of his application statement are false, is without support; though they are material statements, there is no evidence that they were not true when made, and that is the test. It appears that the respondent carried on business in the place for which he had paid the liquor tax, namely, the northwest corner of the Bowery and Stratton's Walk, but he had not paid the liquor tax for a trafficking in liquors on the premises on the northeast corner of the Bowery and Schweickert's Walk and hence, the selling of liquors in that place, as testified to by petitioner's witnesses, was a violation of the provisions of the Liquor Tax Law; it was another room, in another building.

The proof is sufficient and calls for the conclusion that there was, likewise, a violation in the trafficking in liquor on Sunday, September 1st, 1901.

Motion for final order as prayed for in the petition is granted.

Supreme Court, Cayuga Special Term, January, 1902. Reported.
36 Misc. 693.

Matter of the Application of ANDREW L. FRANCE, for an Order
Directing the Calling of a Special Town Meeting in the Town
of Fleming, Cayuga County, New York.

Liquor Tax Law—Resubmission of local option refused where a town clerk's errors as to notice had not affected the vote.

A town clerk's failure duly to post and publish the statutory notices of a submission of the local option propositions at an ensuing regular town meeting does not invalidate the election and require a resubmission where a sufficient petition for submission was duly filed and it is shown that for more than a month before the town meeting the electors knew that the propositions were to be voted on thereat, that during that month the subject had been a matter of general discussion among the residents of the town, and that a full vote was cast thereon.

MOTION by relator for an order directing the town clerk of the town of Fleming, Cayuga county, to call a special town meeting for the purpose of resubmitting to the electors of that town, the propositions set forth in the Liquor Tax Law, under the provision for local option.

Frank M. Leary, for motion.

R. R. Scott, opposed.

DUNWELL, J. At the regular town meeting, February 19, 1901, the electors answered all the propositions in the negative, and the relator, who is a hotel-keeper, makes this motion, alleging irregularities, which he asserts render that election, upon the propositions, illegal and entitle him to have them resubmitted. It is conceded that the petition of ten per centum of the electors of said town, requesting the submission of said propositions, was duly filed with the town clerk more than twenty days before said town meeting, as the law requires.

The relator's objection is that the town clerk did not give the proper notices that the propositions would be submitted at said town meeting. The statute requires that the town clerk shall post a notice of such submission in four public places in said town at least ten days before the town meeting and publish it in one

newspaper in the county at least five days before. The town clerk, in fact, did not publish in a newspaper at all and posted the notices five days before the town meeting, instead of ten; nevertheless, the affidavits, on the part of the respondent, show that the electors of the town meeting were aware that the propositions were to be submitted about one month before the town meeting, and that the subject was one of great interest and a topic of general discussion among the residents of the town for the period; that the number of votes cast at the town meeting was three hundred and six, indicating the attendance of nearly all, if not all, of the electors of the town, being the same number of votes cast at the Presidential election in 1900, an unusually large vote for said town; that all of said voters accepted ballots containing said propositions and returned them in the usual manner to the election officers, and that they were by them deposited in the ballot boxes. The count of the votes upon said local option propositions ranges from seventy-one to eighty-nine in favor thereof, and from one hundred and fifty-two to one hundred and sixty-seven opposed thereto. Each proposition was negated by more than a majority of the whole number of persons voting at said town meeting, practically by a majority of the whole number of voters in said town. There is hardly room for a doubt that the electors of said town were fully apprised, at and before said town meeting, that said propositions were to be voted upon and determined thereat. It is probable that the attendance at said regular town meeting was larger, that the information upon the subject was more general, and that the expressions of the sentiment of the voters was more full and complete, than can be attained at a special town meeting.

The question, then, here presented is whether the omission of some of the formal steps prescribed by the statute for giving notice, shall invalidate the election, although actual and timely notice was in fact received by the voters concerned. An affirmative answer would seem like sacrificing substance to formality.

The statute wisely provides for notice. Care was taken by the Legislature that the electors should not go uninformed. Therefore, it was necessary to designate certain observances that would be regarded as sufficient. But it is not probable that the authors of the statute supposed that the meager information that would reach the voters through four posted notices, and one insertion in a town or county paper, would convey the real and abundant

notice to the electors upon which they would act. It is common knowledge that the formal notices of our elections, prescribed by statute, have comparatively very little to do in informing the electors of the issues at stake at any election. Take the case under consideration for illustration. To begin with, ten per cent., or upwards of thirty voters, at least, signed the petition for the submission of the propositions. They had a right to assume that the clerk would give the proper notice and prepare the ballots. The question of local option to be decided at the ensuing town meeting, as is shown by the affidavits of the respondent, at once assumed importance and was a subject of general controversy and discussion for at least a month throughout the town. The information was disseminated by these discussions as no statutory notices could so effectively do, and the number of votes cast upon the propositions shows that the electors were in fact actually informed, that being the real purpose of the statute. The statute itself does not declare that the omission under consideration shall invalidate the election. Its effect is left for the courts to deal with. The statute reads: "If for any reason except the failure to file any petition therefor, the four propositions provided to be submitted herein to the electors of a town shall not have been properly submitted at such biennial town meeting, such propositions shall be submitted at a special town meeting duly called. But a special town meeting shall only be called upon filing with the town clerk the petition aforesaid and an order of the Supreme or County Court, or a justice or judge thereof, respectively, which may be granted upon eight days' notice to the state commissioner of excise, sufficient reason being shown therefor." Laws of 1901, chap. 640, § 3, amd. Laws of 1896, chap. 112, § 16, the Liquor Tax Law.

It will be seen that if the petition, which must have its origin from a percentage of the body of the people themselves, is not filed, no special town meeting can be called. If the people themselves are not sufficiently interested to take the initiative prescribed by statute, they cannot subsequently complain. Without their initiative no one has the right to assume to represent them by any attempt to submit the propositions. But, for a failure to properly submit in other respects, a special town meeting may be called upon an order of the court, "sufficient reason being shown therefor." Is the failure of the town clerk to post and publish the notice "sufficient reason" to require the setting aside.

of the election in this instance? That it may be sufficient reason in cases that may arise, under circumstances different from those in this case, must be admitted. If the electors do not receive actual notice, then they are at least entitled to as much information as the statutory notice would give. The question involved here has to some extent received the attention of the courts. In *People ex rel. Crane v. Chandler*, 41 App. Div. 178, a case involving the submission of local option propositions under the Liquor Tax Law, a notice by the town clerk was given only four days before the town meeting, but the court held that, as it appeared that the notice given was effectual by actually informing the electors, the propositions were properly submitted, citing *People ex rel. Hirsh v. Wood*, 148 N. Y. 142, where it is said: "We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the wilful misconduct of election officers in performing the duty cast upon them. The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud." In *Matter of Eggleston*, 51 App. Div. 38, the only questions decided were that the town clerk is the proper officer with whom to file the petition and that he is the proper officer to give notice of the submission of the propositions. In *Matter of Rowley*, 34 Misc. Rep. 662, it was held, at special term, that if there was actual notice to the electors a new election would not be ordered because the town clerk had failed to give the statutory notice. In *Matter of O'Hara*, 63 App. Div. 512, it was decided that mandamus was not the proper remedy, to that extent overruling the Eggleston case, but the court in referring to that case remarked that it was decided rightly upon the merits, which is undoubtedly so, for, in the Eggleston case, the petition, although at first filed with the town clerk was removed from his office by the county clerk, so that, in fact, that was a failure to file the petition, which must be conceded to be fatal both under the Election Law and the Liquor Tax Law. But in the present case there was no error except the clerk's failure to post and publish the notice which was held in the Chandler case, *supra*, not to invalidate the election.

In *Matter of Eggleston*, *supra*, 43, the court say: "As suggested above, we determine on this appeal only two propositions:

First, that the petition must be filed with the town clerk; *second*, that he must give notice of the vote on local option as prescribed in the Town Law for propositions submitted to the electors of the town. We do not decide what officer is charged with the duty of furnishing the ballots," etc. It is thus seen that the Eggleston case only holds that the petition must be filed with the town clerk and that he is the officer to give notice of the submission of the propositions, and that, where neither petition is filed nor notice given, the propositions are not properly submitted. While the Eggleston case is undoubtedly authority upon the question there decided, it does not consider or decide the point raised here.

The question involved here is an important one. It is whether a town officer, charged with some duty in respect to a question to be submitted to the people's suffrages, can, by an omission afterwards supplied and rendered unimportant by the action of the people themselves, invalidate their determination at the polls. There is no suggestion of fraud or intentional omission on the part of the town clerk or others interested in the election or that any one concerned has been actually prejudiced. No one was misled nor is there any allegation that any elector of the town was not informed that the propositions were to be submitted, nor is there room for an inference that any voter was left in ignorance of the fact. On the contrary, the undisputed evidence conclusively establishes that all were informed and acted upon the information. To hold, under such circumstances, that the propositions must be again submitted for the purpose of a more formal compliance with the letter of the statute seems against good sense, and the whole spirit of the reported cases construing election laws.

The motion for a special town meeting must be denied, with ten dollars costs to respondent.

Motion denied, with ten dollars costs to respondent.

County Court, Saratoga County, January, 1902. Reported. 36 Misc. 756.

ADELBERT P. KNAPP, Plaintiff, v. T. BERNARD SCANLIN, Defendant.

Liquor Tax Law—Payment of rebate—Duties of State Excise Commissioner.

Where, pending an application by the holder of a liquor tax certificate for its surrender and for the rebate, a judgment creditor attaches his right, title and interest therein, recovers judgment and has a receiver appointed, the receiver cannot procure an order directing the State Commissioner of Excise to pay him the rebate, as the commissioner does not hold the moneys and merely issues orders for the rebate upon the state treasurer and the fiscal officer of the locality.

The commissioner is however entitled to know and must see to it that the rebate is paid to the proper person.

Semble, that where the commissioner declines to issue an order for the rebate because of conflicting claims in regard to it the remedy of the receiver is to bring the matter up by a mandamus to compel him to do so, the fiscal officer of the locality being made a party to the proceeding.

APPLICATION by a receiver in supplementary proceedings for an order directing the payment to him by Henry H. Lyman, State Commissioner of Excise, of the amount of the rebate of liquor tax certificate No. 18,602, issued to defendant June 14, 1900.

James F. Swanick, for Joseph P. Brennan, receiver, for motion.

A. O. Briggs, for Henry H. Lyman, opposed.

ROCKWOOD, J. Joseph P. Brennan, as receiver in supplementary proceedings of T. Bernard Scanlin, judgment debtor, makes application in this action for an order directing the payment to him by Henry H. Lyman, State Commissioner of Excise, of the amount of the rebate of liquor tax certificate No. 18,602, issued to said defendant on June 14, 1900. The motion is opposed upon the grounds that the court has not jurisdiction, and that where the title to the money or to the right of possession thereof is substantially disputed, as is claimed here, an order cannot be made requiring payment or delivery to a receiver. In his affidavit, Mr. Lyman alleges that he has no money in his hands with which to pay the rebate; that provision is made for the issuance of certain orders upon the Treasurer of the State of New York and the proper local fiscal officer for the payment of rebates under section

25 of the Liquor Tax Law, but that on account of alleged conflicting claims to the rebate he has not issued an order for the payment thereof.

In the year 1900 the defendant was conducting the Columbian Hotel in Saratoga Springs, N. Y., and, upon his application, became the holder of the liquor tax certificate aforesaid. His business venture proving unsuccessful the defendant departed from the county of Saratoga, and, upon the allegation that it was with intent to defraud creditors, the plaintiff instituted this action in a Justice's Court on September 13, 1900, and obtained a warrant of attachment which was upon that day levied upon the right, title and interest of the defendant in and to the certificate and rebate moneys aforesaid by due service thereof upon the Saratoga County Treasurer. Other creditors also brought suit and additional attachments were levied in favor of Charles C. Van Deusen on September 14, 1900, for \$108.84; Harry Weller, on September 15, 1900, for \$57.75; John Bolls, on September 15, 1900, for \$26. On September 19, 1900, the plaintiff recovered judgment in this action and caused an execution to be issued thereon. In all of the creditors' actions judgments were ultimately recovered. Prior to his departure and on September 13, 1900, the defendant filed with the Saratoga county treasurer his petition and duplicate surrender receipts in proper form, praying for the cancellation of his certificate in accordance with section 25 of the Liquor Tax Law, and for the refunding to him of the proper amount of the tax paid for the unexpired term of such certificate. This was filed with the State Commissioner of Excise on September 13, 1900. On September 20, 1900, there was filed in the office of the State Excise Commissioner a written instrument purporting to be executed by the defendant on September 13, 1900, but acknowledged on September 19, 1900, assigning to Hial C. Ferguson of Chicago, Illinois, the right, title and interest of the defendant in and to any rebate due upon the cancellation and surrender of the said liquor tax certificate. Proceedings supplementary to execution upon the judgment in the case at bar were instituted on September 27, 1900, and on the following day Joseph P. Brennan was duly appointed receiver of the property and choses in action of the defendant, and upon his qualification an order was obtained requiring Henry H. Lyman to show cause "why the money now in his hands, being a rebate of license No. 18,602 granted to T. Bernard Scanlin by Bartlett

B. Grippen, county treasurer of the county of Saratoga, should not be paid over to Joseph P. Brennan as receiver of said T. Bernard Scanlin." It does not appear that any of the other creditors have had the receivership extended to their proceedings, and no claim is made to Mr. Lyman or the defendant but that the judgment of the plaintiff was regularly obtained.

By the levy of the warrant of attachment, the recovery of the judgment and the issuance of execution, the plaintiff acquired a lien upon the liquor tax certificate and rebate which is prior to that of the other judgment creditors. (*McNeeley v. Welz*, 166 N. Y. 124.)

The only question in the case, therefore, is, — Has the receiver pursued the proper remedy to reach the rebate moneys to which he is entitled? Section 25 of the Liquor Tax Law (L. 1900, ch. 367, § 7) prescribes the method for the surrender and cancellation of liquor tax certificates and the payment of rebates. In substance it is provided that the receiver may surrender the liquor tax certificate or, at his option, continue to carry on the business upon the same premises for the balance of the term for which the taxes are paid and the certificate given. If a petition for surrender is filed with the county treasurer it becomes his duty to transmit the same to the State Commissioner of Excise, who, if the case is a proper one, "shall prepare two orders for the payment of such rebate, one order for the one-third thereof, directed to the state treasurer, to be paid by him on the certificate of the comptroller, and one order for the two-thirds of such rebate, directed to the fiscal officer of the proper locality, to be paid by such fiscal officer out of any excise or other moneys of such locality applicable thereto." These orders shall be transmitted to the officer who issued the cancelled certificate to be delivered to the holder of the duplicate receipt upon the surrender of such receipt, which receipt shall be immediately transmitted to the State Commissioner. Thus, at the outset, it appears that the State Commissioner of Excise at no time has in his possession any rebate moneys as such, and the most that he is required to do under the statute is to issue the orders provided by the Liquor Tax Law before alluded to. The receiver here asks for an order requiring Henry H. Lyman to *pay over* to him "the money now in his hands, being a rebate of license No. 18,602 granted to T. Bernard Scanlin &c."; whereas, as a matter of fact, there is no money in the hands of the State Commissioner of

Excise. Reliance is placed by the receiver upon the provisions of the Code of Civil Procedure, section 2447, to the effect that where it appears from an examination in supplementary proceedings "that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person" an order may be made directing the payment of such money or the delivery of such articles of personal property to the receiver. This section has no application to the present issue, because the order for the payment of the rebate is neither "money or other personal property," capable of delivery within the intent and meaning of said section 2447 of the Code of Civil Procedure. It is a mere chose in action or an intangible right. (*McNecley v. Welz*, *supra*; *Niles v. Mathusa*, 162 N. Y. 546.)

Counsel for the Excise Commissioner insist that the assignment by Scanlin to Ferguson raised such a substantial dispute as to the rights of the parties to the rebate order in question that the only remedy of the receiver is in a direct action to enforce his claim to priority. This would not seem to be an equitable view of the situation, because when the defendant presented his petition for cancellation of the liquor tax certificate he affirmed that he was the owner thereof and entitled to the rebate. This was followed on the same day by the levy of the plaintiff's warrant of attachment, so that the plaintiff, to the extent of his demand, acquired a lien upon whatever rights the defendant had to the rebate moneys. The assignment to Ferguson was plainly an afterthought, but assuming it to be of full legal force and effect, it was, nevertheless, subject to the prior rights which the plaintiff had acquired through his attachment.

In *Herman v. Goodson*, 18 Misc. Rep. 604, and *Niles v. Mathusa*, the rights of assignees of the liquor tax certificate were given preference over those of the receiver, but in each case the assignments were made *prior* to the issuance of the certificates.

These rights the receiver can enforce, but in the present proceeding he has mistaken his remedy. It would be manifestly improper to direct the State Commissioner of Excise to pay over moneys when he has none in his possession. Furthermore, the State Commissioner of Excise is a public officer, whose only duty and evident desire is to see that the statutory requirements are complied with. In the present case he does not even occupy the position of a stakeholder, but must primarily issue an order

for the rebate before the rebate can be collected. If, in a proper case, he should refuse to issue such order, then clearly the power of the courts could be invoked, by writ of mandamus, to compel him to do so. (*People ex rel. Miller v. Lyman*, 156 N. Y. 407; *People ex rel. Ging v. Lyman*, 46 App. Div. 312; *People ex rel. Seitz v. Lyman*, 59 id. 372.)

That would seem to be the proper remedy of the receiver in this case, and the provisions of section 25 of the Liquor Tax Law indicate that the Saratoga county treasurer would be a proper party to such proceeding. The State Commissioner of Excise has no reason for withholding the orders for rebate if it is right that they should be issued, but it is his duty to know that such orders are rightfully issued to the persons entitled to them. The order desired by the receiver here would be ineffectual to protect the State Commissioner of Excise, and for all of the foregoing reasons the motion must be denied but without prejudice to the right of the receiver to institute such other actions or proceedings for the recovery of such rebate moneys as he may be advised. As the receiver has acted in evident good faith the denial of this motion is without costs.

Let an order be entered in accordance herewith.

Ordered accordingly.

First Appellate Department, January, Term, 1902. Reported.
67 App. Div. 446.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DAVID STEVENSON
BREWING COMPANY, Appellant, v. HENRY H. LYMAN, State
Commissioner of Excise, Respondent.

Surrender of a liquor tax certificate—The burden of proving the facts required to be stated in the application therefor rests on the person seeking to surrender it.

Section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), which provides that if the holder of a liquor tax certificate shall surrender the certificate to the officer who executed the same and shall present to such officer a verified petition setting forth certain facts, *inter alia* that the holder has voluntarily ceased to traffic in liquors, such officer shall execute duplicate receipts for the *pro rata* rebate on the certificate, does not operate to make the execution of the duplicate receipts an adjudication of the truth of the allegations contained

in the petition, which will be binding upon the State Commissioner of Excise, who is charged with the duty of paying the rebate.

Where, upon the refusal of the State Commissioner of Excise to pay the amount called for by the duplicate receipts, issued to an assignee of the original holder of the license, the assignee procures an alternative writ of mandamus addressed to the State Commissioner of Excise, which alleges, among other things, that the holder had voluntarily ceased to traffic in liquors prior to the surrender of the said certificate, and that since such surrender he had not been arrested or indicted for any violation of the Liquor Tax Law, and the State Commissioner of Excise serves a return containing a denial of such allegations, it is incumbent upon the assignee to establish the truth of the allegations.

LAUGHLIN, J., dissented.

APPEAL by the relator, the David Stevenson Brewing Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 2d day of February, 1901, upon an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of January, 1901, dismissing an alternative writ of mandamus after a trial at the New York Trial Term.

On or about the 29th day of April, 1898, the Special Deputy Commissioner of Excise for the boroughs of Manhattan and the Bronx, upon payment to him of the sum of \$800, issued liquor tax certificate No. 3,563 to one John Michels, permitting the traffic in liquors at No. 2068 Amsterdam avenue, in the borough of Manhattan, city of New York, for the year ending April 30, 1899. Thereafter, and prior to the 1st of March, 1899, the said John Michels duly assigned and transferred to the relator all his right, title and interest in and to the rebate for the unearned portion of the said liquor tax certificate and authorized the relator to surrender the said certificate for cancellation at any time at its option, and created it his attorney to execute all papers necessary for the purpose of effecting such surrender, and to take such proceedings to recover the amount of such rebate as might be required. On or about the said 1st day of March, 1899, the said Special Deputy Commissioner of Excise was presented with said certificate and with a petition duly verified by relator, as the attorney in fact of the said John Michels, setting forth all the facts required to be shown upon a surrender of a certificate. Thereupon, the said Special Deputy Commissioner of Excise duly executed duplicate receipts showing the amount of the rebate and the other facts required by section 25 of chapter 112 of the Laws

of 1896, as amended by chapter 312 of the Laws of 1897, and delivered the same as required by said act. After thirty days had elapsed since such surrender, the relator demanded from the State Commissioner of Excise the amount of such rebate, but he refused to pay the same.

The relator thereupon moved upon affidavits for a peremptory writ of mandamus. This motion was denied, but an alternative writ was allowed to issue. This writ contained allegations setting forth all the above facts, and also alleged that Michels had voluntarily ceased to traffic in liquors prior to the surrender of the said certificate, and that since the surrender he had not been arrested or indicted for any violation of the Liquor Tax Law, etc.

The return denied that Michels had voluntarily ceased to traffic in liquors at the time said surrender of his certificate was made, and denied that he had not been arrested or indicted for a violation of the Liquor Tax Law since the surrender of the certificate, as alleged in the alternative writ. The return made also the positive allegation that he had been indicted for such an offense.

The issues thus formed by the alternative writ of mandamus and the return thereto were then duly sent to the Trial Term for trial. When the trial was brought on, the defendant claimed that the burden of showing that Michels had ceased to traffic in liquor rested with the relator. The relator claimed that the burden of showing that it was not entitled to the rebate was with the defendant. The court held that the burden was on the relator to show that Michels had voluntarily ceased to traffic in liquors for the term for which said certificate was issued. To this ruling the relator duly excepted, and put in evidence formal proof to show that it had taken all the steps to entitle it to rebate, and rested.

The court thereupon directed the jury to find certain facts, among which was one to the effect that Michels had not voluntarily ceased to traffic in liquors under said certificate for the term for which said certificate was issued. Said verdict being certified to the Special Term, such proceedings were thereupon had that the alternative writ of mandamus was dismissed upon the merits, and from such dismissal this appeal is taken.

William G. McCrea, for the appellant.

N. N. Stranahan, for the respondent.

VAN BRUNT, P. J. It does not seem that there was necessarily any question involved upon the trial of the issues raised by the alternative writ and the return as to upon whom the burden of proof rested as to events occurring after the surrender of the certificate. The right of the relator to the rebate having been denied by the return it was bound to show by proof or admissions upon the record that the holder of the liquor license and his attorney had done all that the law required as conditions precedent to the right to claim such rebate.

It was admitted upon the record that the license had been surrendered and the proper petition filed with the Deputy Commissioner of Excise, and that such Deputy Commissioner had issued the receipt required by law, but the return denied, as it was alleged in the alternative writ, that the holder of the license had voluntarily ceased to traffic in liquors before the surrender of the certificate, and, therefore, claimed that the relator was not entitled to recover the rebate.

It is to be observed that to entitle the holder of a liquor license to surrender the same he must, prior to such tender of surrender, voluntarily have ceased to traffic in liquors.

The existence of this fact is a condition precedent to the right to a rebate, and we cannot find any provision of the statute which makes any action upon the part of the Deputy Commissioner an adjudication upon that subject. According to the statute when a petition is presented to the Deputy Commissioner showing all the facts required to be shown upon such application, he is directed by the statute to issue the receipts required by law. He is not given any power to pass upon the question of the truth of the facts set forth in the petition, and his action in issuing the receipt cannot have that effect. This would seem to be apparent from a reading of the statute. Leaving out those provisions that have no relevancy to the present case, it reads as follows:

"§ 25. If a * * * person holding a liquor tax certificate and authorized to sell liquors under the provisions of this act, * * * shall voluntarily * * * cease to traffic in liquors during the term for which the tax is paid under such certificate, such * * * person or their * duly authorized attorney may surrender such tax certificate to the officer who issued the same * * *, and at the same time shall present to such officer a

verified petition setting forth all facts required to be shown upon such application. Said officer shall thereupon compute the amount of *pro rata* rebate then due on said certificate for the unexpired term thereof, and shall execute duplicate receipts therefor. * * * One of such receipts said officer shall deliver to the person entitled thereto, and the other of such receipts he shall immediately transmit, with the surrendered certificate and the petition for the cancellation thereof, to the state commissioner of excise."

There is evidently no judicial duty imposed by the foregoing provision of the law upon the deputy commissioner. When the certificate is presented to him with a petition setting forth all the required facts he must issue his receipts. There is no power given to him to pass upon the truth of the allegations in the petition, and although undoubtedly if he refused to issue a receipt, he could not be compelled to do so unless the applicant showed that the conditions precedent to the issuance of a receipt had been fulfilled, yet we cannot find anywhere in the statute any authority upon his part to pass upon that question, or to make any admissions relating thereto which will be binding upon the State Commissioner. The State Commissioner is the only one who is empowered to act finally in the matter. When the claimant of a rebate comes to him and demands his rebate, he certainly has the right to demand proof of the fact that the requirements of the law have been complied with. Until they are shown to have existed, no right to a rebate is given by the statute.

The whole foundation of the claimant's demand is based upon the fact that he has, prior to the tender for surrender of his license, voluntarily ceased to traffic in liquors. If he has not, then he has no claim. The statute giving the Deputy Commissioner no power to pass upon this question or even to demand proof upon the subject, it certainly must have been intended that the officer who is to pay the rebate claimed should have the power to demand proof of the right to such rebate. It seems to me that the right to the rebate is to be construed as resting upon a contract between the licensee and the State. If such is the case, clearly the party claiming must show compliance with all conditions precedent.

There is no question of imputing to a man a crime in requiring him to show compliance with the conditions precedent found in a

statute any more than there would be in requiring a man to prove the execution of a contract which has been denied in an answer to a sworn complaint. The claimant comes into court and demands his rebate, alleging that he has done everything to entitle him to such rebate. The State Commissioner says: "You are not entitled to it because you did not cease to traffic in liquors before you presented your certificate for surrender, which is one of the conditions precedent to your being allowed any rebate." Upon whom does the burden of proof lie? Clearly the claimant must prove his case, as in the case of any other contract.

The case of *People ex rel. Brewing Co. v. Lyman* (53 App. Div. 470) may seem upon a cursory examination to be contrary to our view, but no such question was raised in that case, and the remark of the learned justice who wrote the opinion in that case was clearly not considered material.

The order should be affirmed, with costs.

PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting): The proceeding was instituted for the purpose of obtaining a peremptory writ of mandamus to compel the payment of a rebate on liquor tax certificate No. 3,563, issued to John Michels on the 29th day of April, 1898, by the Special Deputy Commissioner of Excise for the Boroughs of Manhattan and the Bronx. The liquor tax certificate authorized the trafficking in liquor at premises No. 2068 Amsterdam avenue, and was duly assigned to the relator, a domestic corporation, by Michels on the 2d day of May, 1898, by an instrument in writing which authorized and empowered it as his attorney in fact to surrender the certificate for cancellation at any time and to obtain the rebate thereon. On the 1st day of March, 1899, the relator acting under said power of attorney, removed the certificate from the place where it authorized trafficking in liquor, and as the agent and in the name of Michels surrendered the same to the Special Deputy Commissioner of Excise. A petition for the rebate in the proper form, setting forth the facts required to be shown by section 25 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312) and, among other things, that the petitioner had voluntarily ceased to traffic in

liquor, accompanied said surrender. Thereupon the relator received from said Special Deputy a receipt for the payment of the *pro rata* rebate amount of the tax paid for the unexpired term of such certificate, as provided in said section. Another duplicate receipt, together with the certificate and petition, the assignment and power of attorney from Michels to the relator, were forwarded to the Commissioner of Excise.

The application for a writ of mandamus was originally noticed for the 5th day of July, 1899, upon an affidavit and exhibits annexed, showing these facts and that the Commissioner of Excise had refused to pay the rebate or to deliver to the relator two orders for the payment of the same, as prescribed in said section 25 of the Liquor Tax Law. The respondent presented in opposition to the motion affidavits denying the allegations of the moving papers to the effect that Michels voluntarily ceased to traffic in liquor, and that he had not been arrested or indicted for a violation of the Liquor Tax Law since the surrender of the certificate, and alleging that he had continued to traffic in liquor and had sold liquor on the licensed premises on the 9th day of March, 1899; that he had been indicted therefor, and that the indictment was pending and undetermined.

The motion for a peremptory writ was denied, but an alternative writ was granted. The alternative writ set forth substantially the same facts as were shown by the moving papers, and, among others, that Michels voluntarily ceased to traffic in liquor at the time of surrendering the certificate for cancellation, and that since surrendering the certificate he had not been arrested or indicted for violating the Liquor Tax Law, and that no proceeding had been instituted for the cancellation of said certificate and no action had been commenced against him for penalties. The return denied that Michels had not been arrested or indicted as alleged and that he had voluntarily ceased to traffic in liquors, and alleged that he continued to traffic therein after the surrender of the certificate and made sales of liquor on the 9th day of March, 1899.

Upon the trial of the issues raised by the return to the alternative writ the relator put in evidence the petition accompanying the surrender of the liquor tax certificate, the certificate, the assignment thereof, and the receipt for the rebate and thereupon rested. This constituted the only evidence offered by either party. The court ruled that the burden was upon the relator to prove

that Michels voluntarily ceased to traffic in liquor under the certificate, and directed a verdict making specific findings of fact in accordance with the allegations of the alternative writ, except that one of such findings was to the effect that Michels had not voluntarily ceased to traffic in liquor under the certificate for the term for which it was issued. To such ruling of the court, as to the burden of proof and to the direction of the verdict in the regard last specified the counsel for the relator duly excepted.

The verdict, as directed, finds that at the time the liquor tax certificate was surrendered for cancellation there was no complaint, prosecution or action pending on account of a violation of the Liquor Tax Law; that since its surrender Michels has neither been arrested nor indicted for a violation of the Liquor Tax Law, and that no proceedings have been instituted for the cancellation of the certificate; that no action has been commenced against him for penalties, and that after the lapse of thirty days from the surrender of the certificate and before the commencement of this proceeding, demand for the payment of said rebate was duly made on the respondent.

Inasmuch as the respondent did not move to set aside the verdict, but on the contrary, moved at Special Term for the dismissal of the proceeding upon the verdict, and has not appealed, the findings, at least so far as they are not challenged by the appellant, must be deemed conclusive. We are at liberty, however, to review the appellant's exceptions to the rulings of the court as to the burden of proof and to the direction of a verdict adversely to him as to the cessation of traffic. (*People ex rel. Coveney v. Kearney*, 44 App. Div. 449; *People ex rel. Boyd v. Hertle*, 46 id. 505.)

The sole question for determination is, therefore, whether the removal of a liquor tax certificate from the place of business where it authorized the trafficking in liquor by the person to whom it was issued, or his duly authorized agent, and the surrender thereof to the excise commissioner, or his deputy, in the form and manner prescribed by section 25 of the Liquor Tax Law, and the issue by the latter to the former holder of the certificate of a rebate except as prescribed by law, where at the time of such surrender there was no complaint, prosecution or action pending against the holder of the certificate for any violation of the Liquor Tax Law, is *prima facie* evidence that the holder of the certificate has voluntarily ceased to traffic in liquor. Upon the surrender of the certificate the authority of the licensee

to traffic in liquor ceased. He had no more right thereafter to sell liquor than if the certificate had never been issued. (*Lyman v. Cheever*, 168 N. Y. 43.) The sale of liquor, without having a liquor tax certificate and without having it posted in the place where the liquor traffic is carried on, is not only prohibited by law but it is a crime. (Liquor Tax Law, §§ 11, 21, 31, 34, 42; Penal Code, § 3.) The presumption of innocence of crime prevails not only in criminal prosecutions but in civil actions as well. This presumption, in the absence of other evidence, not only forbade the finding made by the jury, but, in such circumstances, required a finding in favor of appellant. In this state of the record he was entitled to the presumption that he was not endeavoring to obtain the rebate fraudulently by pretending to have ceased trafficking in liquor and that he was not continuing the business in defiance of the law. (*Korn v. Schedler*, 11 Daly, 234; *Grant v. Riley*, 15 App. Div. 190, 192; *Bayliss v. Cockcroft*, 81 N. Y. 363; *Matter of Fleming*, 5 App. Div. 190; *Hewlett v. Hewlett*, 4 Edw. Ch. 7; *Louisville, New Albany & Chicago Ry. Co. v. Thompson, Admr.*, 107 Ind. 442; *Case v. Case*, 17 Cal. 598; Best Ev. [Chamberl. 8th ed.] § 334; Lawson Presump. Ev. [2d ed.] 112.) There is an exception to the rule that innocence is presumed and that the party asserting the contrary must establish it by proof, in cases where no hardship will be imposed upon a party by requiring him to show, as by a license or otherwise, that he is relieved from a general inhibition of a statute. (*Potter v. Deyo*, 19 Wend. 361; *People v. Nyce*, 34 Hun, 298; *People v. Cramer*, 22 App. Div. 189.) The cases that fall within the exception are not applicable here. In those cases the act or conduct which is forbidden by the law is required to be shown, and it is incumbent upon the party affected to show, by license or otherwise, that he is exempted from the operation of the law. The case at bar has been tried upon the theory that the presumption is that appellant is guilty, and guilt has been found without the introduction of any evidence.

We do not consider these views in conflict with the decision of the Court of Appeals in *People ex rel. Frank Brewery v. Cullinan* (168 N. Y. 258). The question of burden of proof does not appear to have been considered by the court in that case. There the licensee was under arrest for a violation of the Excise Law at the time he obtained the certificate and the prosecution was pending when the application was made for the rebate. The

court held that the property right in the rebate does not attach where there is an arrest or indictment or other prosecution specified in the statute, pending at the time of the surrender of the certificate or within thirty days thereafter, and observed that the conditions specified in section 25 of the Liquor Tax Law, upon which the right to the rebate depended, are conditions precedent. The conditions discussed by the court related to the pendency of a criminal prosecution. The Legislature expressly required proof to be made on application for the rebate that there was no complaint, prosecution or action pending against the licensee on account of a violation of the Liquor Tax Law, and it may well be that where it becomes necessary to apply to the courts to collect the rebate after the lapse of thirty days, that it is incumbent on the applicant to show that he has not been arrested or indicted for a violation of the Liquor Tax Law and that proceedings have not been instituted for the cancellation of such certificate and that no action has been commenced against him for penalties. In order to prevent an erroneous or illegal payment of rebates, it may be that these provisions of the statute should be construed as conditions precedent to be shown by the holder of the liquor tax certificate. It is eminently proper to require the licensee to inform the department and to show on an application to the court whether a proceeding, civil or criminal, has been instituted which may affect his right to the rebate. Proceedings of both classes might be instituted without the knowledge of the Excise Department. It is quite another thing, however, to hold that a licensee after surrendering his certificate is presumed to have continued the business without authority and in defiance of the law, and that the burden is on him to establish innocence.

Authority for this requirement is attempted to be spelled out of the language of section 25 of the Liquor Tax Law relating to the voluntary cessation of liquor traffic. It is manifest that the object of the Legislature was not to require proof that the licensee had ceased to traffic in liquor, which would be sufficiently shown by the fact that he had taken down the liquor tax certificate and surrendered it for cancellation, and the fact that any further sales would render him liable to prosecution and punishment, but that the prosecution was voluntary, as distinguished from duress of a criminal prosecution or a proceeding to forfeit the certificate. This provision of the statute was, I think, merely

designed to prevent the surrender of the certificate and the recovery of the rebate if a complaint, either civil or criminal, has been made and is pending against the holder of the certificate on account of a violation of the Liquor Tax Law which may result in a forfeiture of his right of recovery. The statute does not require the cessation of traffic for any particular length of time before surrendering the certificate, nor does it require the licensee to promise that he will not continue the business in the future. Until the very moment that he removes the certificate he is permitted to continue his business without cessation, or any evidence of his intention to cease traffic. It seems to me quite clear, therefore, that the purpose of the statute was to require proof of the nature of the cessation rather than of the fact that the licensee had ceased to traffic.

I think that this construction of the statute is sustained by *People ex rel. Brewing Co. v. Lyman* (53 App. Div. 470). That was a proceeding similar to this, and the only evidence of a voluntary cessation of traffic was the surrender of the certificate and the issue of the receipt for the rebate. A preliminary objection specifically pointing out that there was nothing to show a voluntary cessation of traffic was overruled, and without further proof a peremptory writ requiring the payment of the rebate was granted. This ruling was sustained on appeal. It is proper to observe that we do not agree with appellant's construction that proof of sales during the thirty days would be no defense, inasmuch as no action or proceeding, civil or criminal, affecting its right to the rebate was commenced or instituted during the thirty days succeeding the surrender of the certificate. The Court of Appeals has held otherwise. (*People ex rel. Frank Brewery v. Cullinan, supra.*)

I am of opinion that the order appealed from should be reversed, the verdict set aside and a new trial granted, with costs to appellant to abide the event.

Order affirmed, with costs.

First Appellate Department, January Term, 1902. Reported.
68 App. Div. 119.

In the Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, Appellant, for an Order Revoking and Canceling Liquor Tax Certificate Issued to BERTHA DICK and Transferred to SOLOMON SCHEPPER and JACOB DICK in Their Firm Name of SCHEPPER & Co.; JACOB DICK, Respondent.

Liquor tax certificate—Motion to cancel it because a door leading to the saloon was kept open on Sunday—Service of the order to show cause upon the person in charge of the premises.

Where a motion for the cancellation of a liquor tax certificate is made upon the grounds, *first*, that the holders thereof had violated clause "H" of section 31 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), by keeping screens, etc., in front of the windows of the premises during the hours when the sale of liquors was prohibited; and, *second*, that they had violated clause "G" of said section, in that they had, on a certain Sunday, kept open a door leading to the room where the liquors were sold, when it was not necessary for any of the purposes mentioned in the statute; and, *third*, that they had violated clause "A" of said section by selling intoxicating liquors on a certain Sunday, and, upon the hearing of the motion, the petitioner fails to prove the first and third charges, but does prove the second charge, conclusively, it is the duty of the court to grant an order canceling this certificate.

In a proceeding for the cancellation of a liquor tax certificate, held by a firm composed of two members, personal service, pursuant to instructions from the court, of the order to show cause why the certificate should not be canceled, and of the petition and affidavit on which it was granted, upon the person in charge of the premises designated in the certificate, is sufficient to give the court jurisdiction to cancel the certificate against both members of the firm, notwithstanding the fact that one of them does not appear on the motion except for the purpose of objecting to the jurisdiction of the court.

APPEAL by the petitioner, Patrick W. Cullinan, as State Commissioner of Excise, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of May, 1901 denying the petitioner's motion to revoke and cancel a liquor tax certificate issued to Bertha Dick and transferred to Solomon Schepper and Jacob Dick in their firm name of Schepper & Co.

Sheldon B. Mead, for the appellant.

Jay C. Guggenheimer, for the respondent.

McLAUGHLIN, J.: On the 30th of April, 1900, a liquor tax certificate was issued to Bertha Dick, which she, on the 29th of August, 1900, with the consent of the Commissioner of Excise, transferred to Solomon Schepper and Jacob Dick, composing the firm of Schepper & Co. Some time thereafter application was made for the cancellation of this certificate upon the grounds, *First*, that Schepper & Co. had violated clause H of section 31 of the Liquor Tax Law, in that they had kept and maintained, during the hours when the sale of liquors was forbidden, screens, blinds, curtains, etc., over or in front of the windows in the saloon, which prevented any one outside from obtaining a full view thereof; *second*, that they had violated clause G of the same section, in that they had, on Sunday, the 7th day of October, 1900, opened and unlocked a door and entrance from the street, alley, yard, hallway, room and adjoining premises to the room on said premises where liquors were sold and kept for sale, "when it was not necessary for the egress or ingress of the said holder of said liquor tax certificate or members of his family or of his servants for purposes not forbidden by this Act, and the said holder of said liquor tax certificate at said time did admit to said room where liquors were sold and kept for sale, persons other than himself, his family and his servants"; and, *third*, that they had violated clause A of the same section, in that they had, on Sunday, the 7th day of October, 1900, sold intoxicating liquors to one Pierce and one Nahrwold, and to divers other persons whose names are unknown to the petitioner.

Testimony of the respective parties was taken before a referee, who reported the same to the court, and the learned justice sitting at Special Term, after a consideration of the same, reached the conclusion that such testimony did not establish the allegations of the petition, and thereupon an order was made denying the application, from which the petitioner has appealed.

We are of the opinion that the application should have been granted. It is true that as to the first and third grounds upon which a cancellation was asked the testimony was conflicting and we are not prepared to say that the conclusion reached by the learned justice as to them is not correct, but as to the second ground there is substantially no dispute between any of the witnesses but what the respondent had the doors leading into the saloon open and unlocked and admitted, at a time when the sale of liquors was prohibited, persons other than servants or members

of his family. For instance, the petitioner's witness Nahrwold testified, and his testimony is not disputed, that when he entered the door leading from the street into the hallway and a second door leading from the hallway to the barroom the doors were both standing open. This witness was corroborated by the witness Pierce. The respondent Dick testified that Nahrwold and Pierce entered the saloon and tried to purchase some beer, which he refused to sell. He did not deny that the doors were open as testified to by them; on the contrary, he admitted that he did not lock the doors Sundays or any other time, and that any one came in there who wanted a meal and that he left the doors unlocked so that they could come in if they wanted to; that he did not keep a hotel, but the barroom and restaurant were all one room, and all the witnesses produced by him testified to substantially the same effect.

We have, therefore, the undisputed fact that on Sunday, the 7th day of October, 1900, at a time when the sale of liquors was prohibited by law, the respondent had open and unlocked the door or entrance from the street and hallway to the room in which liquors were sold and kept for sale and that he, at that time, admitted to such room persons not servants in or members of his family. A clear violation of subdivision G of section 31 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), was thereby established, which provides among other things, that it shall not be lawful to have "open or unlocked any door or entrance from the street, alley, yard, hallway, room or adjoining premises to the room or rooms where any liquors are sold or kept for sale during the hours when the sale of liquors is forbidden, except when necessary for the egress or ingress of the person holding the liquor tax certificate authorizing the traffic in liquors at such place, or members of his family or his servants for purposes not forbidden by this act, or to admit to such room or rooms any other person during hours when the sale of liquors is forbidden," and the petitioner having established that fact was entitled to an order canceling the tax certificate. (§ 28, subd. 2, as amended by Laws of 1900, chap. 367.)

It is suggested by counsel for the respondent Dick that there could not be a cancellation of the certificate so far as the same related to Schepper, inasmuch as the court never obtained jurisdiction of him. There is no force in the suggestion. The order directing Schepper & Dick to show cause why the certificate

should not be canceled directed that the service of a copy of the order and the petition and affidavit upon which the same were granted be served personally upon Schepper & Dick, or "by leaving the same at the place of business designated in said liquor tax certificate with the person in charge of the same." Service was made in the manner directed by leaving the papers with the person in charge of the saloon at the time the service was made. In response to this service Dick appeared. Schepper did not appear, except for the purpose of objecting to the jurisdiction of the court. The certificate was held by the firm of Schepper & Co. It was their property, and service upon the person in charge of the saloon was sufficient to give the court jurisdiction to cancel against both members of the firm.

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and the motion to cancel granted, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

Fourth Appellate Department, January, 1902. Reported 68 App. Div. 650.

PEOPLE v. JOSEPH SIMNACHER.

Judgment of conviction reversed and case remitted to County Court of Cattaraugus county pursuant to section 547 of the Code of Criminal Procedure. *Held*, that the court erred in charging the jury that they might convict the defendant of giving away liquor under the indictment, which did not charge him with giving away liquor, but did charge him with selling it.

All concurred, except MC LENNAN, J., dissenting, and SPRING, J., not voting.

Supreme Court, Suffolk Special Term, February, 1902. Unreported.

PEOPLE ex rel. DAVID SANDMAN v. F. H. TUTHILL.

J. M. Belford, for plaintiff.

George F. Stackpole, for defendant Tuthill.

William Vanamee for the defendant Steele.

W. M. SMITH, J. The defendant, Edgar W. Steele, a special excise agent, on January 11th, 1902, presented to the defendant Tuthill, a justice of the peace of the town of Riverhead, a verified information in writing, of which the following is a copy.

"To F. H. Tuthill, Esq. one of the justices of the peace in and for the county of Suffolk:

"E. W. Steele being duly sworn says that he resides in the town of Mooers, county of Clinton, and State of New York.

"Upon information and belief, that on or after the 1st day of May, 1901, at the town of Riverhead in said county of Suffolk, one David Sandman and other persons of the said town of Riverhead, county of Suffolk, did commit the crime of misdemeanor in that they did at the time and place above named unlawfully, wilfully and knowingly violate the Liquor Tax Law of the State of New York.

"He therefore prays that subpoenas be issued for Samuel Sandman, John Q. Adams, and other persons whose names are at present unknown to this deponent and their depositions taken and that upon all the evidence adduced a warrant be issued and the said Samuel Sandman and any others shown to have violated the N. Y. L. Tax Law be apprehended to answer to said complaint and be dealt with according to law.

Dated at Riverhead, in the County of Suffolk, this 11th day of January, 1902.

Subscribed and sworn to before me this 13th day of January, 1902.

F. H. TUTHILL,
Justice of the Peace.

E. W. STEELE,
Special Agent.

Thereupon the justice issued a subpœna for the relator and examined him at great length, and on at least six different days, and caused him to be committed to the county jail for an alleged contempt for refusing to answer questions propounded to him on such examination, from which imprisonment he was discharged upon a writ of habeas corpus issued by the county judge of Suffolk county, upon the ground among others, that the information above set forth was insufficient to confer jurisdiction upon the justice to issue the compulsory process of subpœna to procure the attendance of a witness before him. Notwithstanding this decision of the county judge the justice continued to act upon such written information whereupon a writ of prohibition is applied for to prevent further proceedings, on such information. The application therefore presents the single question of law, namely, whether the information confers jurisdiction upon the justice to issue subpœnas for witnesses and compel their attendance before him for examination. The information it will be observed, does not contain a statement that the informant has any knowledge that any crime has been committed or that any person has been guilty of any crime, and it does not contain a statement of the sources of the information which the informant professes to have and to believe. Section 148 of the Code of Criminal Procedure provides that "when an information is laid before a magistrate of the commission of a crime, he must examine on oath the informant or prosecutor and any witnesses he may produce."

Assume that in this case that the justice in compliance with this provision of the Code had examined the informant on oath and had elicited nothing more than was contained in the written information, would he have been compelled or would he have had legal authority at the instance of the prosecutor, to compel the attendance of witnesses before him? Reason and authority both answer this proposition in the negative. In the case of the *People v. Hicks*, 15 Barb. 153, a leading case in this State, where a similar question was before the Court, the presiding justice in his opinion, says, "how much then, must be proved by his (the informant's) examination? It seems to me that all that can be required is that enough shall appear to furnish good grounds to believe that further investigation will lead to the discovery of crime" and the court in that case upheld the recorder of the city of New York in his action in compelling the attendance of

witnesses before him by subpoena solely upon the ground that the information did contain facts sufficient to furnish good grounds to believe that further investigation would lead to the discovery of crime. The information in this case contains no legal evidence whatever of any fact tending to show that a crime had been committed. Legally it is a nullity. In the case of the People against Neat in the Court of Sessions of Suffolk county, in 1885, the defendant was indicted for perjury alleged to have been committed upon an examination before a justice of peace, the defendant having been subpoenaed to attend before the justice in a criminal proceeding founded upon an information laid before him, made as in this case wholly upon information and belief, without stating the sources of the information; the county judge, Hon. Thomas Young, dismissed the indictment and discharged the defendant, holding in a well considered and forcible opinion that the magistrate had no authority or jurisdiction to proceed upon the information, which contained no legal evidence of any fact tending to show the commission of a crime. To hold to the contrary would permit evil-minded or misguided persons to use the machinery of the law for the annoyance and inconvenience of peaceable citizens and the prosecution of men upon the suspicion alone that they are guilty of crime. Such a doctrine is contrary to the spirit of the law and cannot be tolerated upon the plea that the motive of the prosecutor in the particular case is good. It is better that some guilty men should escape than the bulwarks erected for the protection of the innocent should be completely overthrown.

The application for a writ of prohibition against the defendant Steele is denied without costs. The application for the writ against the defendant Tuthill is granted, but as he has acted in good faith upon mistaken advice, no costs are imposed upon him.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
March 4, 1902.

In the Matter of the Petition of PATRICK W. CULLINAN to Revoke
the Liquor Tax Certificate of JOSEPH A. BYRNE.

H. H. Kellogg, for petitioner.

Goeller, Shaffer & Eisler, for respondent.

LEVENTRITT, J.: The respondent did not "cease to traffic in liquors during the term for which the tax is paid," and proceedings to revoke and cancel the certificate have been instituted within the thirty days required by the statute (Liquor Tax Law, §25.) The facts are undisputed, the respondent does not deny the sales of liquor after the surrender of the certificate. It has been several times held that violations subsequent to the surrender and within the thirty days forfeit the right to the rebate, and that the property right therein does not become complete until all prohibitions have been removed. (*Matter of Livingston v. Shady*, 24 App. Div. 51; *People ex rel. Lyman v. Miller*, 156 N. Y. 407; *Matter of Lyman v. Fagan*, 26 Misc. 300; *Matter of Michell v. James*, 41 App. Div. 271.) The authority invoked by the respondent, *Lyman v. Cheever*, (168 N. Y. 43), is not in conflict with these views. That case applied to the right of recovering a penalty under the bond given in this class of cases and not the return of the unearned liquor tax, and while the Court of Appeals explicitly limits *People ex rel. Lyman v. Miller* (*supra*), to the question there decided, that authority is not overruled. This case is stronger than the Miller case and the prayer of the petitioner must consequently be granted.

Supreme Court, New York Special Term. Reported. N. Y. L. J.,
March 19, 1902.

In the Matter of the Petition of PATRICK W. CULLINAN to Revoke
the Liquor Tax Certificate of JOSEPH J. HURNEY.

GILDERSLEEVE, J.: This is an application by the State Commissioner of Excise, for an order revoking and cancelling the liquor

tax certificate issued to one Joseph J. Hurney. The grounds of the motion are that said Hurney made certain false statements in his application for the certificate, and that he conducts his place in a disorderly and illegal manner as a house of ill fame. The said Hurney denies each and all of these allegation. The decision of this motion, therefore, necessarily turns upon disputed questions of fact, as to which the affidavits are conflicting, and it appears to be essential for a proper determination of these questions that the witnesses should be cross-examined. I think, under these circumstances, that a reference in aid of the conscience of the court should be ordered. Let an order be handed up referring the matter to Mr. Asa Bird Gardiner to take testimony concerning the facts and circumstances and report the same, with his opinion thereon. Settle order on notice.

Second Appellate Department, March Term, 1902. Reported.
69 App. Div. 399.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE PAUL WEIDMANN BREWING COMPANY, Respondent, v. HENRY H. LYMAN, as State Commissioner of Excise of the State of New York, Defendant.

PATRICK W. CULLINAN, Present State Commissioner of Excise of the State of New York, Appellant.

Mandamus to compel payment of a liquor tax certificate rebate—A denial that the licensee had been duly tried for a violation of the law and discharged is insufficient.

On an application for a peremptory writ of mandamus, requiring the State Commissioner of Excise to issue orders for the payment of a rebate alleged to be due upon a liquor tax certificate, a denial in the return that the licensee had been duly tried before a magistrate for a violation of the Liquor Tax Law and had been discharged, is not a sufficient denial of an allegation of fact, but is a mere legal conclusion that the discharge of the prisoner was not in accordance with law.

APPEAL by Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, from an order of the Supreme Court, made at the Kings County Special Term and entered in

the office of the clerk of the county of Kings on the 18th day of May, 1901, directing that a peremptory writ of mandamus issue to the successor in office of Henry H. Lyman, as State Commissioner of Excise of the State of New York, requiring him to issue two orders for the payment of a rebate alleged to be due upon a liquor tax certificate issued to Robert E. Mason.

William E. Schenck, for the appellant.

Robert H. Wilson, for the respondent.

GOODRICH, P. J.: This order should be affirmed on the authority of *People ex rel. Fallert Brewing Co. v. Lyman* (53 App. Div. 470; *affd.*, without opinion, 168 N. Y. 669). I can find no material difference between the cases. In the *Fallert* case a certificate of the clerk of the Magistrate's Court was annexed to the petition, certifying that the complaint against the licensee was dismissed on the merits.

The denial in the return herein that Mason, the original licensee, was duly tried before Magistrate VOORHEES and discharged, is not a sufficient denial of a question of fact. It is a mere legal conclusion that the discharge of the prisoner was not in accordance with law. That, as was said by Mr. Justice JENKS in the *Fallert* case, is worthless. The discharge was a legal discharge, and that is enough. Here, there is no such certificate, but the allegation is explicit and sufficient to establish the fact of acquittal.

At the present term we have held, in *People ex rel. Stevenson Brewing Co. v. Lyman* (69 App. Div. 406), that an alternative writ of mandamus was proper, because the return charged violations of the law other than the one upon which there had been a trial and dismissal.

In the return in the present case there is no violation alleged other than the one which has been tried, and consequently there is no issue to be tried.

The order must, therefore, be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

Second Appellate Department, March Term, 1902. Reported.
69 App. Div. 406.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. DAVID STEVENSON
BREWING COMPANY, Appellant, v. HENRY H. LYMAN, State
Commissioner of Excise, Respondent.

Mandamus to compel payment of a liquor tax certificate rebate—A violation of the Liquor Tax Law defeats the right to rebate—Where it is alleged, an alternative writ may issue—What is a dismissal of a prosecution therefor against the licensee.

An order made by a magistrate of the city of New York, discharging a person charged with violating the Liquor Tax Law, and reciting that there is no sufficient cause to believe him guilty of a violation of that law, is a dismissal of the proceeding upon the merits within the meaning of section 25 of the Liquor Tax Law relating to the payment of a rebate upon a surrendered certificate.

A violation of the Liquor Tax Law, by trafficking in liquor after the surrender of the certificate and within the term for which the tax was paid, is, of itself, sufficient to defeat a claim, by an assignee of the certificate, for the payment of the rebate for the unexpired term, although no prosecution has even been instituted on account of such violation.

Consequently, where the State Commissioner of Excise, in opposition to a motion for a writ of mandamus to require him to pay a rebate upon a surrendered certificate, sets forth three separate violations of the Liquor Tax Law by the holder of the certificate during the term for which the tax had been paid, and that one of these violations had been made the basis of a criminal prosecution and had resulted in his acquittal, but that no criminal charge had ever been made against him with reference to the two other alleged violations, the relator is entitled to an alternative writ and not to a peremptory writ.

APPEAL by the relator, the David Stevenson Brewing Company, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 25th day of January, 1901, denying the relator's motion for a peremptory writ of mandamus directing the State Commissioner of Excise to pay the rebate alleged to be due on a liquor tax certificate issued to Harry Barry.

William G. McCrea, for the appellant.

N. N. Stranahan, for the respondent.

WILLARD BARTLETT, J.: This appeal raises two questions: (1) Whether a peremptory writ of mandamus should issue in favor of

a person surrendering a liquor tax certificate, directing the State Commissioner of Excise to pay the statutory rebate where facts are alleged in opposition to the application, which, if true, show that the applicant has not voluntarily ceased to traffic in liquors during the term for which the tax was paid under the certificate; and (2) whether an order of discharge by a city magistrate of the city of New York, reciting a determination that there is no sufficient cause to believe the accused person guilty of a violation of the Liquor Tax Law, is a dismissal of the proceedings on the merits, within the meaning of section 25 of that statute.

It seems to me that the second of these questions is no longer open to discussion. In the case of *People ex rel. Fallert Brewing Co. v. Lyman* (53 App. Div. 470) it appeared that the city magistrate "found there was not sufficient evidence to hold defendant for trial," and, therefore, discharged her. This was held to be an acquittal and dismissal on the merits; and the decision of this court to that effect has since been affirmed by the Court of Appeals. (168 N. Y. 669.)

The affidavit in behalf of the relator herein sets out the issue of a liquor tax certificate to Harry Barry; the assignment thereof to the David Stevenson Brewing Company; the presentation of a petition to the State Commissioner of Excise for the rebate upon the unexpired term of said certificate; the delivery of the duplicate receipts required by the statute; the arrest of Barry within thirty days of the surrender for a violation of the Liquor Tax Law; and his trial and acquittal upon such charge.

The papers read in opposition to the application denied that the charge against Barry before the said city magistrate was dismissed on the merits, and set out three separate violations of the Liquor Tax Law by Barry during the term for which the tax was paid. One of these violations was the basis of the criminal prosecution which resulted in the dismissal of the accusation, but no criminal charge had ever been made against him with reference to the two other alleged violations.

I have already shown that, under the authority of the *Fallert* case, the proceedings before the city magistrate must be regarded as having been dismissed on the merits, and, therefore, that the prosecution on that charge afforded no reason for denying the relator's application. As to the other matters, however, the contention of the State Commissioner of Excise is that a violation of the Liquor Tax Law, by trafficking in liquors after the surrender

of the certificate and within the term for which the tax was paid, is in itself sufficient to defeat a claim for the recovery of the rebate, although no prosecution has ever been instituted on account of such violation.

I think such is the effect of the provisions contained in section 25 of the Liquor Tax Law. This is the view which has been taken by the Appellate Division in the first department in the recently decided case of *People ex rel. Stevenson Co. v. Lyman, certificate of John Michels* (67 App. Div. 446), where it is held that to entitle the holder of a liquor tax certificate to a rebate thereon he must voluntarily have ceased to traffic in liquors, and that the existence of this cessation is a condition precedent to the recovery of such rebate. "It seems to me," says VAN BRUNT, P. J., "that the right to the rebate is to be construed as resting upon a contract between the licensee and the State. If such is the case clearly the party claiming must show compliance with all conditions precedent."

In *People ex rel. Frank Brewery v. Cullinan* (168 N. Y. 258), the Court of Appeals, after setting out so much of section 25 as relates to the subject under discussion here, declares, through HAIGHT, J., that upon a careful consideration of such provisions it is apparent that the conditions imposed are conditions precedent. Under this construction of the statute it seems to me that the affirmative allegations in opposition to the relator's application, to the effect that the person to whom the certificate was issued had not ceased to traffic in liquors during the term for which the tax was paid, entitled the respondent to a trial of that question as an issue of fact, and, therefore, that the learned judge who heard the matter at Special Term was right in deciding it as he did, that the relator might have an alternative writ, if he wished, but that he had not made out a case for a peremptory mandamus.

The order should therefore, be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

First Appellate Department, March Term, 1902. Reported. 70 App. Div. 110.

PATRICK W. CULLINAN, as State Commissioner of Excise of the State of New York, Respondent, *v.* CHARLES FURTHMANN and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellants.

Request to go to the jury, when in time—Sale of liquor on Sundays—

Proof that the place of the alleged sale was sublet by the licensee—

Oral proof of the sublease—Any conflict of evidence takes a case to the jury—Willful false testimony—Impeachment of a witness.

Where, upon the denial of a motion by the defendants for a dismissal of the complaint, the plaintiff moves for the direction of a verdict, a request by the defendant to go to the jury upon certain questions, made after the court has announced its intention to direct a verdict in favor of the plaintiff, but before the verdict has been taken or entered, is made in time, and if the request be improperly denied, a new trial must be granted.

In an action to recover the penalty of a bond given upon an application for a liquor tax certificate, in which the defendant's liability is predicated on the fact that liquor was sold on Sundays in a basement under, and connected by a stairway with the licensed premises, it is error for the court to exclude evidence tending to show that the licensee had sublet the basement and that the sublessee was in possession thereof at the time that the sales in question were made.

The sublease being only collaterally involved, secondary evidence of its contents is admissible.

A conflict in the evidence upon a material point requires the submission of the case to the jury.

Where a witness willfully testifies falsely to a material fact, the court or jury may reject his entire evidence.

The credibility of witnesses, whose testimony is substantially impeached or contradicted, is to be determined by the jury and not by the court.

APPEAL by the defendants, Charles Furthmann and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 29th day of April, 1901, upon the verdict of a jury rendered by direction of the court.

Terence J. McManus, for the appellant Furthmann.

Moses Weinman, for the appellant United States Fidelity and Guaranty Company.

Herbert H. Kellogg, for the respondent.

LAUGHLIN, J.: This action is brought against the principal and surety to collect the penalty on a bond given on the application of appellant Furthmann for a liquor tax certificate, authorizing him to traffic in liquors on premises No. 2158 Eighth avenue in the city of New York for one year from the 1st day of May, 1898. The application was granted.

The complaint charged and evidence was offered by the plaintiff tending to show violations of the Liquor Tax Law (Laws of 1896, chap. 112, as amended) on Sunday, August 28, and Sunday, September 4, 1898, as follows: (1) In selling liquor in the basement of the premises under the barroom with which there was an open connecting stairway; (2) in having door from street to said basement unlocked; and (3) in permitting persons, not members of the family of the licensee, to enter said basement where liquor was being sold. Other violations of the Liquor Tax Law on Sunday, September 11, 1898, were charged and supported by evidence, as follows: (1) In selling liquor in the barroom; (2) in having the door from the street to the barroom unlocked; (3) in permitting others than members of his family to enter the barroom; and (4) in having a partition across the barroom in such manner as to obstruct the view of persons in the barroom from the street in front.

At the close of the evidence the defendants moved for a dismissal of the complaint, and upon their motion being denied, plaintiff moved for a direction of a verdict. The record shows that the court granted the motion on the ground that the evidence as to selling in the basement on August twenty-eighth and September fourth was uncontroverted. After the intention of court to direct a verdict was announced, but before the verdict was taken or entered, the defendants' counsel asked to go to the jury upon the questions with reference to the alleged violations of the Liquor Tax Law and specifically upon the credibility of the special agents who gave the only testimony tending to show such violations. These requests were denied, and exceptions taken.

The requests to go to the jury were timely made, and if there was error in their refusal, a new trial must be granted. (*Second National Bank v. Weston*, 161 N. Y. 525.)

The verdict cannot be sustained on account of the alleged violations of the law on the first two Sundays, for the court erred, we think, in rejecting competent evidence offered by the defendants bearing upon that question. The plaintiff showed that the

licensee had a lease of the basement and that on the Sundays in question liquor was being sold there by a bartender who on week days was in the employ of the licensee in the barroom above. A sign appeared over the basement "Chatauqua Club" and "Gustav Huegel, Billiard, Pool and Shuffle Boards." The licensee testified that he had nothing to do with that business and that he did not at any time in 1898 sell or allow liquor to be sold in the basement. On the objection as incompetent the court precluded the licensee from answering a question as to whether he had in that year a sub-tenant in the basement and sustained a general objection to the question, "Who did business in this basement?" and to the question "Who, to your knowledge, was in possession of the basement underneath the store in the month of August, 1898?"

The licensee also testified that he entered into an agreement in writing with Huegel concerning the basement; that he did not have the writing; that he turned it over to the tenant who succeeded him who was at the time of the trial a resident of Vermont and absent from the State. He was then asked to give the contents of that paper. This was objected to on the ground that it called for secondary evidence and the objection was sustained. The licensee was then asked if he received any money from Huegel in 1898 for rent of the basement. That was objected to generally. The objection was sustained and an exception taken.

We think it was error to exclude the evidence tending to show that the basement had been sublet and was in the possession of Huegel as the licensee's tenant as that would tend to show that Furthmann was not responsible for sales made in the basement. As the lease was only collaterally involved, secondary evidence of its contents was admissible.

The respondent seeks to uphold the verdict principally upon other grounds than those assigned by the court, and the rule is invoked that the judgment may be sustained upon any ground appearing in the record that would have justified the action of the court. (*Scott v. Morgan*, 94 N. Y. 508; *Marvin v. Universal Life Insurance Co.*, 85 id. 278.)

We are further of opinion that the testimony of the three special agents relating to the violations of the law was sufficiently contradicted and impeached to require that their credibility be submitted to the jury. One of these witnesses, Sandford, testified to violations on the three days. Waterman claims to have accom-

panied Sandford and testified to violations on the first two Sundays. Adee claims to have accompanied Sandford on the third Sunday and testifies to the same violations on that day. According to the testimony of these agents the licensee was in the basement on the second Sunday and they talked with him about its being hot there, and he said if they would come around the following Sunday he would have a place open for them upstairs where it would not be so hot. One of them testified that a stairway between the basement and saloon was open and there was no door on it. They testified that on the third Sunday they saw the licensee outside the saloon and he directed them to the side door entering the barroom; that upon entering they ordered drinks and were served by the bartender employed there on week days; that they passed down the inside stairway, which was open, to the basement and back up again; that at this time the licensee had entered and was serving liquor to people in the barroom, and saw them served with some drinks; that there was a partition across the barroom as already described. The licensee testified that he never saw any of these witnesses; that he never sold or allowed liquor to be sold in the basement; that he did no business on Sundays, and did not sell or allow liquor to be sold on the licensed premises during the prohibited hours or on Sunday during that year, and that he never was in the saloon on Sunday; that there was no partition across the barroom as described by plaintiff's witnesses; that there was a door at the foot of the inside stairs cutting off communication with the basement, and that he personally closed and locked this door every Saturday night and it so remained until the following Monday morning. A carpenter was called and he testified that in the fall of 1897, on the employment of the licensee, he built a door at the foot of the inner stairway to cut off communication between the basement and saloon.

It is now well settled that a conflict in the evidence upon a material point requires the submission of a case to a jury. (*McDonald v. Metropolitan St. Rwy Co.*, 167 N. Y. 69.) It is equally well settled that where a witness wilfully testifies falsely to a material fact the court or jury may reject his entire evidence. (*People v. Evans*, 40 N. Y. 1; *Pease v. Smith*, 61 id. 477; *Deering v. Metcalf*, 74 id. 501.) The credibility of witnesses whose testimony is substantially impeached or contradicted is to be determined by the jury and not by the court. (*McDonald v. Metropolitan*

St. Rway. Co., supra; Williams v. Del., Lack. & West. R. R. Co., 155 N. Y. 158; 11 Am. & Eng. Ency. of Law [2d ed.], 498; 1 Thomp. Trials, § 1038.)

For these reasons the judgment should be reversed and a new trial granted, with costs to appellants to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellants to abide event.

Third Appellate Department, March Term, 1902. Reported.
70 App. Div. 260.

ALBANY BREWING COMPANY, Respondent, *v.* EDWARD L. BARCKLEY, as Treasurer of Albany County, Defendant, Impleaded with A. PAGE SMITH, as Receiver, etc., of JOSEPH SEENEY, Appellant.

County Court—A judgment establishing an equitable claim upon a liquor tax certificate cannot be rendered by it.

After the holder of a liquor tax certificate had assigned the same as security for an indebtedness, a receiver of his property was appointed in proceedings supplementary to execution. The receiver, finding the liquor tax certificate in the possession of the licensee, surrendered it to the county treasurer and received a statement of the amount of the rebate due thereon. The assignee of the certificate thereupon brought an action against the county treasurer in the County Court for the conversion of the certificate, and, upon motion of the assignee, the receiver was made a party defendant.

Upon the trial the court dismissed the complaint as against the county treasurer and rendered a judgment in favor of the plaintiff against the receiver, adjudging "that the plaintiff has an equitable claim upon the certificate in question and any rebate thereon, and that such receiver took such certificate subject to such claim."

Held, that the County Court had no jurisdiction to grant such a judgment and that such jurisdiction could not be conferred by consent of the receiver.

APPEAL by the defendant, A. Page Smith, as receiver, etc., of Joseph SeeneY, from a judgment of the County Court of Albany county in favor of the plaintiff, entered in the office of the clerk of the county of Albany on the 18th day of June, 1901, upon the

verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 21st day of June, 1901, denying the defendant's motion for a new trial made upon the minutes.

In April, 1897, a liquor tax certificate was issued to one Joseph Seeney, who thereupon assigned the same to this plaintiff as security for an indebtedness. Upon October 27, 1897, the defendant Smith was appointed receiver of the property of Seeney in proceedings supplementary to execution. This liquor tax certificate, having been found in the possession of Seeney, was, upon the first day of November following, surrendered to defendant Barckley, as treasurer of Albany county, together with a petition in due form for its cancellation and the payment to him of the proper rebate. The treasurer thereupon gave to the receiver a receipt for the certificate and a statement of the amount of rebate and by whom payable, and sent to the State Commissioner of Excise, as he was by law required to do, a duplicate of the receipt, together with the certificate and petition for cancellation. Thereupon this action was brought against the said Barckley, as treasurer of Albany county, for a conversion of this certificate. Upon motion of the plaintiff the defendant Smith was thereafter made a party defendant, upon the allegation that he claimed to have some interest in the certificate, which interest, if any, arose subsequent to the plaintiff's interests. The action was brought to trial and the plaintiff recovered a judgment for conversion against the said Barckley, which judgment was by this court reversed and a new trial ordered. (See 42 App. Div. 335.) Upon the new trial, upon motion of plaintiff, the complaint was dismissed against the defendant Barckley, and, against the defendant Smith's objection, the jury were directed to render a verdict that, under the facts in this case and as between the plaintiff and defendant, the receiver, "the plaintiff has an equitable claim upon the certificate in question and any rebate thereon, and that the receiver took such certificate subject to such claim." Thereupon a judgment was entered adjudging that the plaintiff have judgment, without costs, against the defendant Smith, as receiver, etc. "That the plaintiff has an equitable claim upon the certificate in question and any rebate thereon, and that such receiver took such certificate subject to such claim." From this judgment the defendant Smith, as receiver, has appealed to this court.

George H. Mallory, for the appellant.

Robert W. Hardie, for the respondent.

SMITH, J.: This judgment must be reversed as beyond the power of the County Court to grant. The jurisdiction of that court is prescribed by statute. There is no statutory authority for a trial by the County Court of the issue which was here tried between the plaintiff and the defendant Smith, nor for the granting of any judgment upon such an issue. This want of jurisdiction is not cured by any proceeding on the part of the defendant Smith, as a defendant is powerless, even by consent, to confer jurisdiction of the subject-matter in litigation upon a court of limited jurisdiction. It becomes unnecessary, therefore, to examine the other objections discussed upon the briefs of counsel. The judgment must be reversed and a new trial granted, with costs to appellant to abide the event of the action.

All concurred.

Judgment reversed on the law and facts and new trial granted, with costs to appellant to abide event.

Fourth Appellate Department, March Term, 1902. Reported.
70 App. Div. 511.

THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, Plaintiff, *v.* THE AMERICAN BREWING COMPANY, Defendant.

Undisclosed principal—When liable to a surety company against which a judgment has been recovered on a bond accompanying a liquor tax certificate—Parol evidence to show that the principal named in the bond was an agent of the undisclosed principal—Subrogation.

A surety upon a bond accompanying a liquor tax certificate, who becomes such without knowledge that the principal named in the bond is acting as the agent of a third person, and who, because of the maintenance of a gambling device upon the licensed premises in violation of the conditions of the bond, is obliged to pay a judgment recovered by the State Commissioner of Excise against him and the nominal principal for the penalty of the bond, may maintain an action against the undisclosed principal to recover the amount so paid.

In such a case the admission of parol evidence of the existence of the undisclosed principal does not violate the rules of law relative to the admission of such evidence in actions upon written contracts.

Semble, that if neither the nominal principal nor the surety had paid the judgment recovered by the State Commissioner of Excise, the latter could maintain an action against the undisclosed principal to recover the amount of the judgment, and that the surety, upon payment of the judgment, would become subrogated to this right.

MCLENNAN and HISCOCK, JJ., dissented.

MOTION by the plaintiff, The City Trust, Safe Deposit and Surety Company of Philadelphia, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, upon the dismissal of the complaint by direction of the court at the Monroe Trial Term.

Charles Van Voorhis, for the plaintiff.

George F. Yeoman, for the defendant.

DAVY, J.: At the Monroe Trial Term on the 27th day of November, 1901, and before any evidence was given, the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was granted and the plaintiff excepted. The exception so taken was ordered to be heard by the Appellate Division in the first instance and that judgment be suspended in the meantime.

The only question to be considered upon this motion is, does the complaint state a cause of action?

The complaint alleges, in substance, that on or about the 11th day of November, 1897, a liquor tax certificate was duly issued to one John M. Kurtz, authorizing him to engage in the traffic of liquor at No. 153 Main street, East, in the city of Rochester, N. Y.; that in order to obtain said license a bond was given to the People of the State of New York in the penal sum of \$1,000, which was signed by John M. Kurtz, as principal, and the City Trust, Safe Deposit and Surety Company of Philadelphia, the plaintiff herein, as surety; that the conditions of this bond were, that the said Kurtz would not suffer or permit any gambling upon the said licensed premises; that he would not permit or suffer said premises to become disorderly, and that he would not violate any of the provisions of the Liquor Tax Law (Laws of 1896, chap. 112, as amd.). It further alleges that on or about the 12th day of July, 1898, the Commissioner of Excise, of the State of New

York commenced an action against said Kurtz and this plaintiff to recover the penal sum mentioned in said bond, on the ground that there had been a breach of its conditions by said Kurtz in maintaining and suffering to be maintained upon said licensed premises a nickel-in-the-slot machine, which was a gambling device upon which people did play for money by chance; that a judgment was obtained in that action against said Kurtz as principal and the plaintiff as surety, and an appeal was taken from that judgment to the Appellate Division and to the Court of Appeals, and the judgment was affirmed in both courts, which judgment was subsequently paid by said plaintiff as surety upon the bond.

The complaint also alleges that the defendant was the undisclosed principal on said bond, and was the owner of the liquor tax certificate; that the business in said saloon was conducted for the benefit of the defendant, and that defendant owned the lease of the store, furnished the stock of goods therein, including fixtures; that it paid all expenses of running said place; that said Kurtz was employed by the defendant as manager and paid twelve dollars a week for his services, and that he had no interest whatever in the said business.

The learned justice before whom the case was moved for trial held that the decision of the court in *Farrar v. Lee* (10 App. Div. 130) is decisive and controlling in the case at bar. It appears that that action was brought upon a bond against an undisclosed principal, and the court held that as the contract was in writing and under seal, and was not executed in the name of the undisclosed principal, and as it did not appear on the face of the instrument that the same was made in his behalf, that no recovery could be had against him in an action founded upon the bond.

This action is brought, not upon the bond, but against the defendant, an undisclosed principal, to recover the money which the plaintiff, as surety, was compelled to pay for the defendant's benefit. Although the principal was concealed, the contract, however, was made by its agent, upon its authority and for its benefit and advantage. It is a rule of law that an undisclosed principal, when subsequently discovered, may, at the election of the other party, if exercised within a reasonable time, be held liable upon all contracts made in his behalf by his duly authorized agent, although the credit was originally given to the agent under a misapprehension as to his true character.

In this action the complaint alleges that when the plaintiff executed the bond at the request of Kurtz, it was not aware of the fact that Kurtz was acting as agent for the defendant. The fact that Kurtz executed the bond as principal does not preclude the plaintiff from maintaining this action, upon parol proof that the contract, in fact, was the contract of the defendant; that the act of Kurtz was the act of the defendant, and that, therefore, the defendant was liable for the breach of the contract.

In *Briggs v. Partridge* (64 N. Y. 362), in discussing the question under consideration, Judge ANDREWS, said: "The doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract, entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity." (*Brady v. Nally*, 151 N. Y. 262; *Coleman v. First National Bank of Elmira*, 53 id. 393; *Mecker v. Claghorn*, 44 id. 349; *Jessup v. Steurer*, 75 id. 613; *Nicoll v. Burke*, 78 id. 580; *Story Agency* [9th ed.], § 270.)

In *Coleman v. First National Bank of Elmira* (*supra*) it was held that the rule does not preclude a party who has entered into a written contract with an agent from maintaining an action against the principal, upon parol proof that the contract was made, in fact, for the principal, although the agency was not disclosed by the contract and was not known to such party at the time of making it. (*Briggs v. Partridge*, *supra*; *Pierson v. Atlantic National Bank*, 77 N. Y. 310.)

The rule of evidence which makes a written contract conclusive proof of what the parties have agreed to, and which rejects parol proof to vary or contradict the writing or its legal import, applies only in controversies between the parties to the instrument. (*Folinsbee v. Sawyer*, 157 N. Y. 196.)

There is another well-settled principle of law applicable to this case, and that is that where a surety pays the debt of his principal, the surety has a right to be put in the place of the creditor, and to avail himself of every means the creditor had to enforce payment against the principal debtor. This principle of

law comes under the rule of subrogation, which is not founded upon contract, but upon principles of equity and justice, and may be enforced where no contract or privity of any kinds exists between the parties.

In *Arnold v. Green* (116 N. Y. 571) Judge VANN says: "The remedy of subrogation is no longer limited to sureties and *quasi* sureties, but includes so wide a range of subjects that it has been called the 'mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it.'" (*Cole v. Malcolm*, 66 N. Y. 363; *Townsend v. Whitney*, 75 id. 425; *Jessup v. Steurer*, *supra*; *Pease v. Egan*, 131 N. Y. 262.)

In *Lewis v. Palmer* (28 N. Y. 271) the court held that a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor.

Assuming that in the action upon the bond the execution had been returned unsatisfied against both the plaintiff and Kurtz, can there be any question but that the excise commissioner, acting for the People, could have maintained an action in equity against the defendant, who was the undisclosed principal, to recover the amount of the judgment? I think not. The defendant had authorized Kurtz, its agent, to make the contract, and it was done for defendant's benefit and with its consent and approval. The defendant received the emoluments of the business, which it could not have carried on without giving the bond.

If the State Excise Commissioner could maintain such an action, then the plaintiff can maintain this action, for the reason that, when plaintiff paid the judgment, it became subrogated to all the rights of the State, and could avail itself of every means that the State had to enforce payment of the judgment.

In the case of *Kane v. State ex rel. Woods* (78 Ind. 103), where a party applied to the board of excise commissioners for a license to sell intoxicating liquors, and in order to obtain his license was required to give a bond to the State with sureties in the penal sum of \$2,000, conditioned, among other things, that he would pay all judgments that might be recovered against him for any violation of the provisions of the act regulating the sale of liquors, the principal was four times convicted for violating the provisions of said act; judgments were obtained against him, and, having failed to pay them, they were paid by the surety; and it was held

that the surety was entitled to be subrogated to all the rights of the State, the judgment creditor. (*Boltz's Estate*, 133 Penn. St. 77; *Matter of Churchill*, 39 Ch. Div. 174; *Richeson v. Crawford*, 94 Ill. 165; *Dias v. Bouchaud*, 10 Paige, 461.) It will be seen from these cases that no distinction is made between an official bond given to the State and an ordinary bond given to an individual; the surety in either case, upon paying the debt of the principal, has a right to be subrogated to all the rights of the creditor, and may invoke every remedy for its enforcement.

Benham v. Emery (46 Hun, 160) was a contract under seal made by the husband in his own name for a building on his wife's land. It appeared that the contractor was ignorant that the husband was acting as the agent of his wife, the undisclosed principal. The court said: "The plaintiff may pass by the written agreement and recover upon an implied promise for the work and labor done and material furnished, as the same was done for the benefit of the defendant, and with her consent and approbation; it is fair that she should pay the plaintiff for his work and labor and the material which he furnished to improve her own property, as the same was done with her consent and she now enjoys the benefit and the advantages derived therefrom." The court, in further discussing this question, said: "As a test that the defendant is liable for the work and labor and materials furnished, suppose the defendant had authorized her husband, as her agent, to borrow in her name and on her account, a sum of money, not authorizing him to execute any written promise in her name for the repayment of the loan, and in pursuance of such authority he had borrowed a sum of money of a third party, who was ignorant that he was acting as agent and executed in his own name a promise under seal to repay the loan himself and had delivered the money received over to his wife, his principal, can there be any doubt but that she would be liable in an action for the money had and received? The authorities are abundant that the lender could pass by the special agreement made by the agent and sue for the money loaned and advanced, upon an implied promise to repay the money which she had received from the loaner by the hand of her agent." (*Donagan v. Moran*, 53 Hun, 21; *Higgins v. Dellinger*, 22 Mo. 397.)

It would be against public policy to permit the defendant to give a bond in the name of an irresponsible servant, to enable it to carry on the liquor business and to violate the conditions of

the bond through its servant in order that it might derive a pecuniary benefit therefrom and then be screened from any liability, on the ground that it did not sign the bond. Fair and honest dealings should be upheld, but courts of justice should not help parties to consummate fraud and deception.

Upon the facts, as alleged in the complaint, we think the action can be maintained, and that the court erred in dismissing the complaint. Plaintiff's exceptions, therefore, should be sustained and the motion for a new trial granted, with costs to the plaintiff to abide the event.

SPRING and WILLIAMS, JJ., concurred; MC LENNAN and HISCOCK, JJ., dissented.

MCLENNAN, J. (dissenting): It seems to me that the law of principal and agent has no application to this case. The conditions of the bond related solely to the personal acts and conduct of Kurtz. By its terms he was not liable for the acts of any one else, unless permitted or authorized by him upon the premises covered by the liquor tax certificate. Neither was any one else liable for his acts. It was purely a personal obligation on the part of Kurtz. Whether the bond should be violated or not, and thus the surety become liable, was wholly with Kurtz and for him to determine. The act of the brewing company, or of any one else, could not create an obligation under the bond. It seems to me that it might as well be said that if an agent gave a bond to keep the peace, and violated it while acting as agent, the principal would be liable on such peace bond, or for the amount the surety had to pay.

It seems to me clear that upon principle as well as upon authority the case was rightly disposed of by the court below. I, therefore, think the motion for a new trial should be denied, and judgment ordered for the defendant.

HISCOCK, J., concurred.

Plaintiff's exceptions sustained and motion for new trial granted, with costs to the plaintiff to abide the event.



